Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

GUADALUPE ROJAS,

Petitioner,

v.

LAWRENCE FITCH, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Agostini v. Felton*, ___ U.S. ___, 117 S.Ct. 1997 (1997), and other Establishment Clause precedent support the unemployment tax exemption which now expressly divides the universe of all non-profit, charitable, and educational employers into two categories, the religious and the secular, granting the exemption to the religious and denying it to the secular?

2. Where a statutory benefit on its face targets religion as the beneficiary, excluding similar but secular entities, does the government bear the burden of producing evidence of a secular purpose?

3. Does a statutory tax exemption granted to an employer, based on the employer's religious status, which operates to deny an employee eligibility for a Social Security Act benefit, contravene the Establishment Clause and prior decisions of this Court?

LIST OF PARTIES

Guadalupe Rojas, Plaintiff and Petitioner

Lee H. Arnold, Director, R.I. Department of Employment and Training, Defendant and Respondent, substituted for original defendant Lawrence Fitch, former Director.

Secretary, United States Department of Labor, Defendant and Respondent

The Salvation Army, Defendant and Respondent

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PETITION FOR WRIT OF CERTIORARI

Guadalupe Rojas ("Rojas") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on October 9, 1997, in order to correct serious inconsistencies with this court's Establishment Clause decisions, in relation to a statute of national application.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First circuit is reported as *Rojas v. Fitch*, 127 F.3d 184 (1st Cir. 1997), and that decision affirmed the judgment of the District Court for the District of Rhode Island, *Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996). By order dated December 18, 1997, the First Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. 41.

JURISDICTION

On October 9, 1997, the Court of Appeals for the First Circuit issued its judgment and opinion upholding the constitutionality of the challenged Federal Unemployment Tax Act (FUTA) provision exempting churches from coverage. App. 1.

On October 18, 1998, the Court of Appeals denied the petition for rehearing and suggestion for rehearing en

banc. Jurisdiction to review the decision of the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(2) 28 U.S.C. § 3309
(set forth in full in Appendix 43)

(3) R.I. Gen. Laws, § 28-42-8
(set forth in full in Appendix 46)

STATEMENT OF THE CASE

(a) Nature of the Proceedings

This is an action that was commenced by Guadalupe Rojas (Rojas) in the District Court in Providence, seeking declaratory and injunctive relief. Rojas challenged the statutory exemptions, both federal and state, in the unemployment insurance program. Those exemptions apply to religious employers and resulted in the denial of unemployment benefits to her.

In her amended complaint, Rojas added the United States Secretary of Labor as a defendant, along with the

original defendant, the Director of the R.I. Department of Employment and Training (DET), the state agency which administers the joint federal-state unemployment insurance program. The Salvation Army, Rojas' former employer, was allowed to intervene as a defendant, without objection. The federal defendant moved to dismiss on various grounds. The parties submitted a joint stipulation of facts and documents, which was accepted by the District Court as the record in this case on February 27, 1996. An administrative appeal in state court, appealing the denial of unemployment benefits, was stayed by the state court pending resolution of the federal claims in this action. The federal court action was filed prior to the state court action.

On June 10, 1996, the District Court entered final judgment for defendants, in accordance with the opinion of June 7, 1996. That decision is reported as *Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996).

On June 20, 1996, Rojas moved to alter or amend the judgment under F.R.C.P. Rules 52(b) and 59. On October 11, 1996, the District Court denied that motion, and a timely appeal to the First Circuit followed. The state defendant cross-appealed, *Rojas v. Arnold*, 97-1089, First Circuit.

The Court of Appeals for the First Circuit enlarged the time for argument in this case and granted a request for post-argument memoranda limited to discussion of *Agostini v. Felton*, ___ U.S. ___, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997), and *City of Boerne v. Flores*, ___ U.S. ___, 117 S. Ct. 2157 (1997).

Thereafter the Court of Appeals rendered its decision on October 9, 1997, and denied rehearing on December 18, 1997.

The docket reflects a non-jury one-day trial, which was actually the acceptance of a Joint Stipulation of Facts and Documents, followed by extensive legal argument. In addition, the District Court received a number of extensive memoranda from the parties.

The facts of the case are as follows (taken from The Joint Stipulation submitted to both the District Court and the Court of appeals):

1) Rojas worked for The Salvation Army in Providence for a total of approximately six years, from 1986-1994, interrupted by a brief employment with Catholic Social Services in 1990-1991. She returned to The Salvation Army when the Catholic Social Services grant expired.

2) Rojas' position at The Salvation Army was a social caseworker for a predominantly Spanish-speaking caseload. She was not clergy nor was her job a religious function. In fact, Rojas has never been a member of The Salvation Army.

3) On March 18, 1994, Rojas was terminated, effective that day, allegedly due to financial constraints.

4) Rojas applied for unemployment benefits on or about April 13, 1994.

5) DET denied unemployment benefits to Rojas. The only stated reason was the exemption of her former employer, under Section 28-42-8(4) of the Rhode Island General Laws.

6) DET first concluded that The Salvation Army was an exempt employer in 1987.

7) Rojas requested that DET produce any documentation DET had concerning the decision to exempt The Salvation Army, and DET agreed to do so.

8) DET relied on the 1955 Internal Revenue Service letter in reaching its 1987 conclusion that The Salvation Army was exempt.

9) The DET did not rely on any other information in reaching the 1987 decision.

10) When Rojas began working for The Salvation Army, her employer had not yet been declared exempt by DET.

11) No written decision was issued by DET in 1987, nor was any formal decision made. There were telephone calls between DET (then D.E.S., Department of Employment Security) and The Salvation Army which resulted in DET terminating the employer's account.

12) Prior to 1987, The Salvation Army was a covered employer.

13) There were no communications between the federal government and DET in 1987 on the issue of whether to exempt The Salvation Army.

14) There were, and are, no application forms, regulations, rules, procedures, definitions, or stated criteria used by DET in deciding whether an employer's request for the church exemption should be granted.

15) In Rhode Island, churches and individual parishes can choose to be exempt or not exempt, depending

on their preference. A church can choose to be voluntarily covered even though DET would allow the exemption.

16) An employer known as Catholic Cemeteries at some point had its coverage discontinued, and the exemption granted, at its request.

17) Most churches which are exempt are self-declared, *i.e.*, they do not register as employers with DET and are not in the system, without any affirmative granting of the exemption by DET.

18) Employees of exempt employers, or covered employers who become exempt, are not required to be notified of the exemption possessed by their employers.

19) DET does not distinguish between different types of employees or jobs within an employer's workforce. If the employer is deemed exempt, all employees are outside the unemployment insurance system.

20) It is not possible for the employer to be exempt from the tax and yet have any employee still covered by unemployment insurance.

21) Non-profit corporate employers, which qualify as 501(c)(3) entities, have the option of being covered by the DET payroll tax or of being "self-insured", which means reimbursing DET dollar for dollar for any employee's unemployment benefits. Either way, such employers are not exempt, and their employees are covered.

22) If a non-profit employer (which was not a church) performed the same type of social services in the community as that performed by The Salvation Army, it could not be exempt.

23) DET does not maintain any list or record of exempt employers because most never entered the system.

24) At the Referee hearing, DET could not recall any instance of denying a request by an employer for the church exemption.

25) The Catholic Diocese of Providence was treated by DET for many years as covered by the tax, as were all churches. Then in "the '80's" the Diocese demanded that it be exempt and that the state refund all the money that it had ever paid in. Rhode Island refunded the money.

26) One criteria used by DET is "if someone calls themself [sic] a church, and it is through common knowledge that they are a church, then we grant the exemption, *i.e.*, the Diocese of Providence, The Episcopal Diocese of Providence".

27) The DET official with authority to rule on exemption issues testified that he understood the federal government to require the church exemption.

28) The Salvation Army described Rojas' job as a caseworker, dealing with utility problems, food, and social services. She worked Monday through Friday at an office at 386 Broad Street, Providence, Rhode Island. She was not, and was not required to be, a member or soldier of The Salvation Army in order to obtain or hold her job.

29) In general, except for certain top positions, employees are not required to be Salvation Army members.

30) The Salvation Army asserted that the layoff of Rojas was part of a Northeast regional financial cutback of employees and equipment.

31) The Salvation Army testified that Rojas and other employees were given the October 1993 revised employee Manual which stated that The Salvation Army was exempt. The employer did not have knowledge of any prior notice to Rojas. (The Salvation Army was not exempt when Rojas was hired). Rojas recalled no such prior notice.

32) Rojas testified that none of her work involved any religious or "lay minister" function.

33) On August 16, 1994, the Board of Review of DET upheld the Referee's Decision and affirmed that Rojas could not collect unemployment benefits because her employer, The Salvation Army, was exempt under Section 28-44-8(4)(A) of Rhode Island General Laws.

34) On September 9, 1994, plaintiff commenced this action in federal court.

ARGUMENT

Summary

This Court should grant certiorari because the decision of the Court of Appeals is contrary to several Establishment Clause decisions of this Court, including *Texas Monthly v. Bullock*, 489 U.S. 1, 109 S. Ct. 890, 103 L.Ed.2d 1 (1989); *Walz v. Tax Commission*, 397 U.S. 664, 90 S. Ct. 1409 (1970); and *Agostini v. Felton*, ___ U.S. ___, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997).

Rojas was denied unemployment benefits solely because her former employer was exempt by federal and state statute, an exemption which is no longer available to the broad range of non-profit, educational, and charitable employers originally encompassed in the statute. This exemption is now a government benefit which is not neutrally and generally available. Rather the statute expressly targets the benefit to the religious non-profit and denies it to all other non-profit employers which lack the religious identification.

The Court of Appeals discussed *Agostini* but disregarded its essential teaching as well as other recent Establishment Clause cases, that a government benefit must utilize neutral secular criteria, must neither favor nor disfavor religion, and must be available to both religious and secular beneficiaries on a non-discriminatory basis. This case involved a federal statutory benefit which expressly uses religion as the touchstone and divides the universe of all non-profit employers into two categories – the religious (eligible for the government benefit) and the secular (not eligible).

The Court of Appeals also disregard the holding and rationale of *Texas Monthly v. Bullock, supra,* which found a Texas sales tax exemption for religious periodicals unconstitutional even though the state also exempted a variety of other unrelated items such as food, agricultural items, and property used in manufacture. This Court's plurality opinion in *Texas Monthly* focused on the availability of "like benefits" to a wide array of nonsectarian groups. *Id.* at 899, n. 4.

The Court of Appeals, like the District Court, also parted company with this Court's precedents on secular purpose, when it discerned or created such a purpose even though none appears in the record or in the statute itself.

Lastly, the Court of appeals ignored another aspect of Rojas' argument, as well as another precedent of this court, *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 1057 (1982) ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.") The decision below did not address the uniqueness of this case, in which the government's religious criteria for granting a benefit to an employer simultaneously operates to exclude a third party (Rojas) from an otherwise available Social Security Act program.

1) Until 1970 FUTA Exempted Churches and a Broad Range of Secular Charities and Non-Profits. In 1970 and Again in 1976 Congress Narrowed the Exemptions so that a Broad Range of Non-Profits is no Longer Exempt.

The Federal Unemployment Tax Act ("FUTA" or "The Act"), 26 U.S.C. Section 3301-3311, is part of the Social Security Act's federal-state system providing benefits to unemployed workers. Under this scheme, employers pay a federal tax based on a percentage of wages but are given credit for payments made into federally approved state unemployment compensation programs. 26 U.S.C. Section 3301-02. All states participate, and in order to remain eligible the states' own laws must be consistent with FUTA's requirements.

Early in its history, FUTA survived various constitutional challenges, including challenges to certain exemptions. See *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S. Ct. 883, 889, 81 L.Ed. 1279 (1937); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S. Ct. 868, 873 (1937).

Up until 1970 FUTA excluded from coverage "service performed in the employ of a religious, charitable, educational, or other tax exempt organization". *California v. Grace Brethren Church*, 457 U.S. 393, 397 (1982). Then, "in 1970 Congress amended FUTA to require state plans to cover employees of non-profit organizations, state hospitals, and state institutions of higher education, *thus eliminating the broad exemption available to non-profit organizations.*" *Grace Brethren Church*, 457 U.S. at 397 (opinion of Justice O'Connor, for the Court; emphasis added). "At the same time, Congress enacted Section 3309(b) to exempt from mandatory state coverage a *narrow class* of religious and educational employees". *Id.* (emphasis added).

That "narrow class" in 1970 consisted of employers of:

1) Employees of churches or primarily religious organizations;

2) Ministers and members of religious orders; and

3) Those "in the employ of a school which is not an institution of higher education".

Grace Brethren Church, at 398.

Six years later in 1976, Congress narrowed still further this already narrow class of exempt employers, deleting the third category (school employees). "In order

to maintain compliance with FUTA, the states promptly amended their corresponding state programs". *Id.*, at 398.

Similarly, in *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), this Court heard both statutory and constitutional challenges to FUTA by plaintiff churches which sought to have their church-related schools exempt from coverage. The court analyzed Congressional intent in the 1970 and 1976 amendments and concluded that the schools in question were included in the church exemption. Thus the Court did not reach the churches' argument that Congress must grant the exemption under the First Amendment. *Id.*, at 788.

The district court in the present case acknowledged that Congress in 1970 had retained only a narrow class of exempt charitable entities and that it had narrowed the class still further in 1976, to the religious category. *Rojas v. Fitch*, 928 F. Supp. at 158. The Court of Appeals also acknowledged the repeal of the previously broad exemption available to all nonprofits. *Rojas*, 127 F.3d at 186.

2) This Court's First Amendment Tax Exemption Cases Focus on the General Availability of an Exemption to a Range of Similar Entities in Addition to Churches.

In *Walz v. Tax Commission*, 397 U.S. 664, 90 S. Ct. 1409 (1970), the Court upheld a New York City tax exemption for religious organizations. The exemption was part of a broad provision, actually derived from the state constitution:

> Exemptions from taxation may be granted only by general laws. Exemptions may be altered or

> repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.
>
> *Walz*, at 666-7

Chief Justice Burger, for the Court, focused on the neutrality principle. *Id.* at 669-673. He looked at the language of the exemption to analyze the purpose.

> It [New York] has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups.

In 1989 a state sales exemption was invalidated in *Texas Monthly v. Bullock*, 489 U.S. 1, 109 S. Ct. 890, 103 L.Ed.2d 1 (1989). There the statute exempted periodicals of a religious nature, an exemption not granted to any broad variety of non-sectarian publications as well.

Texas did extend a sales tax exemption to an assortment of other entities (for sales of food, agricultural items, and property used in the manufacture of articles for ultimate sale). 109 S. Ct. at 899 n. 4. However, it was the lack of the exemption for similar but secular entities that caused the statute to fail under the Establishment Clause. "What is crucial is that any subsidy afforded

religious organizations be warranted by some overarching secular purpose that justifies like benefits for non-religious groups." *Id.*, at 899, n. 4. A list of exemptions from the same Texas sales tax, for a variety of entities, "for *different* purposes does not rescue the exemption for religious periodicals from invalidation." *Id.* (Emphasis in original).

In *Texas Monthly* it was noted that "every tax exemption constitutes a subsidy that affects non-qualifying taxpayers, forcing them to become indirect and vicarious donors". *Id.*, at 899. "Insofar as that subsidy is conferred on a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause". *Id.*

Relying on *Walz*, the *Texas Monthly* plurality opinion noted that "the breadth of New York's property tax exemption was essential to our holding that it was not aimed at establishing, sponsoring, or supporting religion . . . but rather possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity and encouraging private groups to undertake projects that advanced the community's well being and that would otherwise have to be funded by tax revenues or left undone". *Texas Monthly*, 109 S. Ct. at 898.

Justice Brennan's opinion in *Texas Monthly* quoted Justice Harlan's separate opinion in *Walz*, where the latter stated that:

> As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be anti-theological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups.
>
> *Texas Monthly*, 109 S. Ct. at 898-9.

An important question is how expansive the broad range of exempt groups should be.

> How expansive the class of exempt organizations or activities must be to withstand constitutional assault depends upon the State's secular aim in granting a tax exemption. If the State chose to subsidize, by means of a tax exemption, all groups that contributed to the community's cultural, intellectual, and moral betterment, then the exemption for religious publications could be retained, provided that the exemption swept as widely as the property tax exemption we upheld in *Walz*. By contrast, if Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life, then a tax exemption would have to be available to an extended range of associations whose publications were substantially devoted to such matters; the exemption could not be reserved for publications dealing solely with religious issues, let alone restricted to publications advocating rather than criticizing religious belief or activity, without signaling an endorsement of religion that is

> offensive to the principles informing the Establishment Clause.
>
> *Texas Monthly*, 489 U.S. at 15.

The Court of Appeals sidestepped *Agostini* by claiming that Rojas is urging that a statutory benefit must include "every group that could also conceivably fall within the secular rationale for the exemption provision." 127 F.3d at 189; App. 11. This is simply not what *Texas Monthly* or *Walz* indicates, and it is not the issue in this case. The question presented by Ms. Rojas is whether Congress had any secular purpose in 1970 and 1976 when it eliminated the non-profit exemption for *all* employers except those having a religious identity. Section 3309(b) is not challenged on the grounds of under – inclusiveness. It is challenged because it preserves the nonprofit-charitable exemption expressly for one type of employer and one type only – the religious employer.

At least two other tax cases under the First Amendment are worth noting. In *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 110 S. Ct. 688 (1990), a unanimous Court upheld California's generally applicable sales and use tax against a church's argument that the Free Exercise Clause prevented application of the tax to transactions involving religious materials. The Court expounded on what it referred to as the plurality opinion in *Texas Monthly v. Bullock*, 489 U.S. 1, 109 S. Ct. 890 (1989), and noted that a tax which is not a flat tax, is not a prior restraint, and applies neutrally to all retail sales does not contravene the Free Exercise Clause. 110 S. Ct. at 695.

The Court in *Swaggart* reiterated that both taxation and exemption involve some level of involvement between government and religion. *Id.*, at 697-8. The opinion goes on to note that "we have held that generally applicable administrative and record-keeping regulations may be imposed on religious organizations without running afoul of The Establishment Clause". *Id.*, at 698. "[A]nd the record-keeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs". *Id.*

Even if the required payment of social security and unemployment taxes did violate an employer's fundamental religious belief, and burden free exercise, that burden is still justified in light of government's very strong interest in "assuring mandatory and continuous participation in and contribution to the social security system". *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 1056 (1982). In *Lee*, an Amish employer objected to required social security and unemployment taxes. An exemption by statute was available to self-employed Amish but not to an Amish employer. As the Court noted, "Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew a line in Section 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer". *Lee*, 102 S. Ct. at 1057.

3) The Court of Appeals Decided the Secular Purpose Issue in a Manner Which Conflicts with the Relevant Decisions of This Court.

The Court of Appeals, like the District Court, simply found a secular purpose which existed nowhere in the record and nowhere in the Congressional record of the 1970 and 1976 amendments. 127 F.3d at 188. Like the District court, it used the original Congressional purpose from the 1930's, which had a constitutionally valid purpose of bestowing an exemption on all non-profits, charities, schools, whether religious or not. Rojas has never contended that the original exemption statute, prior to 1970, was invalid. 928 F. Supp. at 163. However, the Court of Appeals did not seek the secular purpose Congress had in mind in 1970 (and 1976), when it withdrew the exemption from the previously broad group and "enacted" a narrow exemption. *Grace Brethren*, at 398.

Congress did *not* then use neutral criteria which focused on the size of the employer, the irregular employment patterns, or the lack of easy accountability of wages. If it had, such criteria would no doubt be valid. Instead Congress used religion. Thus if a secular non-profit has irregular employment patterns or wages not easily accountable, it is still covered by the tax. But The Salvation Army, and other church organizations, which may be very large, very stable, and with thousands of regularly employed staff, are exempt.

The supposed secular purpose not only has been created as a post-hoc attempt to buttress a religiously targeted benefit, but it also lacks all logic.

In *Texas Monthly*, the court pointed out that "there is no evidence in the record" of some "secular legislative policy that motivated similar tax breaks for non-religious activities". *Id.*, 198 S. Ct. at 899, n. 4. The same is true in the present case, with statutory provisions (and history) which expressly favored religion and expressly removed the broad range of non-profits.

The Court of Appeals decision in this case is in conflict with the Seventh Circuit on the issue of burden of production in a facial Establishment Clause challenge.

In *Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995), the court invalidated a state law closing public schools on Good Friday. Chief Judge Posner, for the majority, reasoned that the burden of presenting evidence of a secular purpose rested with the government. *Id.*, at 622. Judge Manion, dissenting, distinguished the burden of production from the burden of persuasion, which he believed always stayed with the plaintiff. *Id.*, at 625.

Even under the Judge Manion test, the FUTA exemptions must fall. In *Metzl*, the plaintiff had alleged that the legislature sought to favor Christians over other religions and had failed to show that intent, according to the dissent. In the present case, Rojas does not allege that FUTA favors one religion over another, but that it favors religious non-profits over similarly situated secular non-profits. The fact and evidence of that selective benefit is found in the statute's current wording, not in an effort to discern the subjective purposes of members of Congress.

Chief Judge Posner pointed out that the Illinois statute "on its face . . . violates the Establishment Clause unless it has a secular justification. The existence of such

a justification is in the nature of a defense, and the burden of producing evidence in support of a defense is, of course, normally on the defendant". *Id.*, at 622. He goes on to state:

> We do not wish to make a fetish of the rules of evidence. The constitutionality of statutes is typically determined by reference to general considerations, values, intuitions, and other "legislative facts" (in the sense of considerations that typically influence legislative judgments) rather than to facts presented through testimony and other formal evidence subject to rules of evidence developed largely for the control of lay juries. Still, when the facts necessary for judgment, however, they might be adduced, are missing in a case, the court has to decide who shall bear the onus for having failed to place them before the court. It seems to us that where as in this case the challenged law places the support of the state behind a wholly sectarian holiday and the only possible justification concerns the internal operations of a branch of state government, the burden of presenting whatever type of fact might support the justification should rest on the state. It was the state's decision to pitch its defense on the infeasibility of keeping the schools open on Good Friday The question of feasibility is not one that can be settled as a matter of first or general principles. It requires a showing of fact that the state has not attempted to make.

Applying that reasoning to the present dispute, it should have been the job of the state or federal government to present to the court the "defense" that the *facial* distinction in the statutes between religious non-profits

and secular non-profits can somehow be explained. Is there some administrative facilitation difference between two otherwise similar employers? Are we to simply hypothesize that religious entities and their workforces are less "permanent" or less "stable"?

In *St. Martin, supra,* the Court had to closely analyze the Congressional purpose in order to decide if the remaining exemption extended far enough to include situations where the employment was not in the church building but under the umbrella of the church organization. *St. Martin,* 451 U.S. at 781. Justice Blackmun relied on Senator Long's explanation and on the 1970 House Report, which had identical language to the Senate Report:

> "This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled or principally supported by a church (or convention or association of churches). Thus, the services of the janitor of a church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be

> considered under this paragraph to be operated primarily for religious purposes". H.R. Rep. No. 91-612, p. 44 (1969).

The repeal of Section 3309(b)(3) brought back into the system the non-profit private school. *St. Martin, supra.* But if that exact same school is religious, then it is still exempt by Section 3309(b)(1).

If size of the employer, number of permanent employees, or "stability" of the employer had been the Congressional concerns, then secular categories or criteria could easily have been used. In fact Congress had demonstrated that it knows exactly how to exempt the very marginal employer from the system. See 26 U.S.C. Section 3309(c) (exempting non-profits which do not have at least four employees at least twenty days a year). *That* exemption can stand on its secular footing relating to the administrative convenience in not covering the very small or impermanent employment situation.

Following the 1976 amendments, litigation ensued over whether church schools were now in the system because of the elimination of the school exemption or still exempt because of the church exemption. See, e.g., *State of Alabama v. Marshall*, 626 F.2d 366 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). The courts concluded, even before *St. Martin, supra*, that Congressional intent was clear in the amendments, that the exemption was for schools having an integral part of the religious mission of the governing church. *State of Alabama*, at 368. "Although both sides of this case point to evidence of Congressional intent favoring their positions, the law is well settled that

a statute must be interpreted according to its plain language unless a clear contrary legislative intention is shown". *Id.*

Thus, the Court of Appeals in the present case ignored the admitted religious criteria and purpose of Section 3309(b) and substituted its own creation, an "administrative" secular purpose which is superfluous in light of the Section 3309(c).

In order to reach this result, the Court of Appeals had to disregard the analysis of both the dissenters and the majority in *Agostini v. Felton*, 117 S. Ct. 1997 (1997), all of whom closely examined the neutral secular criteria used by Congress in the Title I funding program at issue.

Under the First Circuit's analysis in *Rojas*, the *Agostini* result would be the same even if Congress now amended the Title I program and made it available to religious schools only, not to all schools. This is such a serious misreading of *Agostini* that Rule 10(c) of this Court is appropriately invoked. In fact, it would be entirely consistent with *Agostini* to grant certiorari, vacate the First Circuit judgment, and remand for further consideration in light of *Agostini* and other decisions of this Court. No new ground need be broken to correct the error in this case. In light of *Walz*, *Texas Monthly*, *Grace Brethren*, and *Agostini*, the decision below is simply incorrect on the law.

CONCLUSION

The Decision of the Court of Appeals is contrary to relevant decisions of this Court on an important federal question. The decision seriously misconstrues *Agostini v. Felton* and must be corrected. The petition for certiorari should be granted, and this matter scheduled for full briefing, or alternatively, the judgment of the Court of Appeals should be vacated and remanded in light of established precedents of this court.

Respectfully submitted:

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Guadalupe ROJAS, Plaintiff-Appellant,

v.

Lawrence FITCH, et al., Defendants-Appellees.

Guadalupe ROJAS, Plaintiff-Appellee,

v.

Dr. Lee H. ARNOLD, et al., Defendants-Appellants.

Nos. 96-2328, 97-1089.

United States Court of Appeals, First Circuit.

Heard June 2, 1997.

Decided Oct. 9, 1997.

John W. Dineen, with whom Yesser, Glasson & Dineen, Providence, RI, was on brief for appellant Guadalupe Rojas.

Scott Glabman, Attorney, Washington, DC, with whom J. Davitt McAteer, Acting Solicitor of Labor, Mount Hope, WV, Charles D. Raymond, Associate Solicitor for Employment and Training, Legal Services, and Harry L. Sheinfeld, Counsel for Litigation, U.S. Department of Labor, Office of the Solicitor, Washington, DC, were on brief for appellee Cynthia A. Metzler, Acting Secretary of Labor.

Rebecca Tedford Partington, Assistant Attorney General, Providence, RI, for appellee Dr. Lee Arnold, Director, Rhode Island Department of Labor and Training.

Michael G. Dolan, with whom Cadwalader, Wickersham & Taft, and Gerard P. Cobleigh, Warwick, RI, were on brief for appellee Salvation Army.

Before TORRUELLA, Chief Judge, CAMPBELL, Senior Circuit Judge, and BOUDIN, Circuit Judge.

TORRUELLA, Chief Judge.

Plaintiff-Appellant Guadalupe Rojas, a former employee of the Salvation Army, sought a declaratory judgment that exemptions for religious employers under the Rhode Island unemployment tax statute and under the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301-3311, violate the Establishment Clause and the Equal Protection Clause of the federal Constitution, as well as Article I, § 3 of the Rhode Island Constitution, which protects the Freedom of Religion. She named as defendants the director of the Rhode Island Department of Employment and Training ("DET") and the Secretary of the federal Department of Labor. The Salvation Army intervened as a defendant. The district court rejected all of Rojas's substantive arguments for declaratory relief, *see Rojas v. Fitch*, 928 F.Supp. 155, 162-67 (D.R.I. 1996), and now, on appeal, she reasserts her federal Establishment Clause and Equal Protection claims. We affirm.

BACKGROUND

The following facts are not disputed. Rojas was a paid employee of the Salvation Army, serving as a social case worker from 1988 to 1994, except for a short interruption in 1990 and 1991 when she worked for Catholic Social Services. Rojas was not, and was not required to be, a soldier or member of the Salvation Army when employed as a case worker. The Salvation Army terminated her employment on March 18, 1994, citing financial constraints.

Approximately one month after her termination, Rojas applied for unemployment insurance benefits from the DET. The DET found that Rojas was ineligible because her former employer, the Salvation Army, was exempt from contributing to Rhode Island's unemployment insurance scheme under sections 28-42-8(4) and 28-44-11 of the Rhode Island General Laws.[1] Pursuant to the exemption for religious employers under section 28-42-8(4), no taxes were withheld from Rojas's wages by the Salvation Army, and her income was not reported to the DET. The DET's denial of benefits was upheld by a DET referee after a hearing, and later the referee's determination was upheld by the DET Board of Review.

On September 9, 1994, Rojas initiated an action in federal district court against the Director of the DET, seeking declaratory invalidation of the exemption under either the Establishment Clause,[2] the Equal Protection Clause,[3] or Article I, § 3 of the Rhode Island Constitution.[4] In an amended complaint, Rojas added the

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[1] In 1987, the DET determined that the Salvation Army is a "church" and thus entitled to an exemption pursuant to R.I. Gen. Laws § 28-42-8(4).

[2] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . ").

[3] U.S. Const. amends. V, XIV.

[4] Article I, § 3 provides, in pertinent part:

> . . . no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person's voluntary contract; nor enforced, restrained, molested, or burdened in body or goods; nor

Secretary of the Department of Labor as a defendant, on the theory that FUTA's allowance of state exemptions for religious employers in the federal-state unemployment insurance system was an underlying cause of the Rhode Island exemption she challenged. *See* 26 U.S.C. 3309(b) (FUTA provision listing permissible employer exemptions, including exemption for religious employers). The Salvation Army was allowed to intervene, without objection, as a defendant.

FUTA establishes a federal-state unemployment benefit scheme requiring employers to pay a federal excise tax, *see* 26 U.S.C. § 3301 (computing the tax as a percentage of wages of covered employees), but encouraging the development of state unemployment insurance programs in the following ways: first, employers paying into a qualifying state unemployment fund are entitled to a credit on the federal tax, *see* 26 U.S.C. § 3302, and second, a qualifying state is entitled to receive federal grants toward the cost of administering the state's unemployment compensation program, *see* 42 U.S.C. § 503. Rhode

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> disqualified from holding any office; nor otherwise suffer on account of such person's religious belief; and that every person shall be free to worship God according to the dictates of such person's conscience, and to profess and by argument to maintain such person's opinion in matters of religion; and that the same shall in no wise diminish, enlarge, or affect the civil capacity of any person.

R.I. Const. art. I, § 3. Rojas also appealed the decision of the DET board in state court, a suit which has been stayed pending resolution of her federal civil action.

Island's unemployment fund qualified for participation in the FUTA system.

FUTA exempts certain classes of employees from mandatory state coverage by a qualifying state plan. *See* 26 U.S.C. § 3309(b). The current scope of exemptions reflects amendments made to FUTA by Congress in 1976. The 1976 Amendments narrowed the set of employees who were exempt from mandatory state coverage, by requiring, for example, that previously exempted school employees be covered. In 1970 as well, the scope of FUTA exemptions was narrowed significantly by Congress when it repealed a broad exemption previously available to all nonprofit organizations. *See generally California v. Grace Brethren Church*, 457 U.S. 393, 397, 102 S.Ct. 2498, 2502, 73 L.Ed.2d 93 (1982) (describing the 1970 and 1976 FUTA Amendments).

Currently, the segments of the labor force that the states are not required to cover under FUTA section 3309(b) include persons "in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches." 26 U.S.C. § 3309(b)(1). Also exempt are employees of small nonprofit organizations (having fewer than four regular employees), *see* § 3309(c), elected state employees, *see* § 3309(b)(3), employees at certain rehabilitation facilities, *see* § 3309(4)(A), and inmates of custodial or penal institutions, *see* § 3309(b)(6).

The Rhode Island Employment Security Act ("RIESA"), R.I.G.L. §§ 28-42-1 *et seq.*, exempts a variety of

kinds of employment from coverage. *See* R.I. Gen. Laws § 28-42-8 (1995). Apparently tracking the language of FUTA, Section 28-42-8(4)(i) exempts service performed "in the employ of: (A) A church or convention or association of churches, or (B) an organization which is operated, supervised, controlled, or principally supported by a church or convention or association of churches." Other exempted employees under RIESA include certain insurance brokers, golf caddies, certain rehabilitation center employees, and certain real estate brokers. R.I. Gen. Laws §§ 28-42-8(11), (9), (4)(B)(iii), (10).

The defendants raised a number of procedural claims below, all of which were rejected by the district court. Upon reaching the merits of Rojas's suit, the district court rejected all of her claims. On appeal, Rojas argues that the Rhode Island and FUTA exemptions for religions violate the Establishment Clause and the Equal Protection Clause of the federal Constitution, while the appellees reassert their claims that jurisdiction is lacking because of the Tax Injunction Act, 28 U.S.C. § 1341 and that the appellant lacks standing.

DISCUSSION

Because we find that the appellant's claims fail on the merits, we need not reach either the claim put forward by the federal defendant-appellee that Rojas lacks standing to challenge FUTA or the claim put forward by the state defendant-appellee that the Tax Injunction Act bars federal jurisdiction over the suit. *See Norton v. Mathews*, 427 U.S. 524, 530-31, 96 S.Ct. 2771, 2774-75, 49 L.Ed.2d 672 (1976); *Hachikian v. FDIC*, 96 F.3d 502, 506 n. 4 (1st

Cir.1996) (" 'It is a familiar tenet that when an appeal presents a jurisdictional quandary, yet the merits of the underlying issue, if reached, will in any event be resolved in favor of the party challenging the court's jurisdiction, then the court may forsake the jurisdictional riddle and simply dispose of the appeal on the merits.' ") (quoting *United States v. Stoller*, 78 F.3d 710, 715 (1st Cir.1996)).

I. The Establishment Clause Claim

At the core of the Establishment Clause is the idea that government cannot "favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion." *Walz v. Tax Comm'n*, 397 U.S. 664, 694, 90 S.Ct. 1409, 1424, 25 L.Ed.2d 697 (1970) (Harlan, J., concurring) (noting that while disagreements over applications of Establishment Clause are common, its core ideal is well established). In order to vindicate this constitutional guarantee, two tests have long guided judicial review of any challenged legislation: first, the law must have a purpose other than to advance or inhibit religion; second, the primary effect of the law must not be to advance or inhibit religion. *See, e.g., Abington School District v. Schempp*, 374 U.S. 203, 222, 83 S.Ct. 1560, 1571-72, 10 L.Ed.2d 844 (1963) ("The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."). A third practical concern under the Establishment Clause is that the net effect of governmental programs avoid "excessive governmental entanglement with religion." *Walz*, 397 U.S. at 674, 90 S.Ct. at 1414.

These threads were united in the well-known three-part test in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which provides: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13, 91 S.Ct. at 2111 (quoting *Walz*) (citation omitted). The district court applied the *Lemon* test in the course of holding that FUTA and the RIESA did not violate the Establishment Clause. *See* 928 F.Supp. at 163-66. This approach was appropriate, for the Supreme Court, despite criticisms of previous applications of the *Lemon* test, essentially confirmed in *Agostini v. Felton*, ___ U.S. ___, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), that the *Lemon* criteria still apply. *See* ___ U.S. at ___, ___, 117 S.Ct. at 2010, 2015.

In *Agostini*, the Court overruled its Establishment Clause decision in *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985) – which had barred the New York City Board of Education from sending public school teachers into sectarian private schools to teach remedial classes pursuant to Title I – but nevertheless stated that the general tests used in analyzing challenged legislation under the Establishment Clause had *not* changed. The *Agostini* decision reaffirmed the need to ascertain that laws have a secular purpose and a primary effect other than advancing religion, *see* ___ U.S. at ___, 117 S.Ct. at 2010, and explicitly incorporated the entanglement prong into the effects calculus, thereby making the third prong of *Lemon* a part of the second prong, *see id.* at 2016. The Court in *Agostini* noted that what has changed since

Aguilar are certain presumptions regarding the effects of neutral laws that incidentally confer benefits to religions. *See* ___ U.S. at ___-___, 117 S.Ct. at 2010-13 (stating that the Court no longer considers the presence of public school employees on parochial school property to lead ineluctably to the impermissible effect of advancing or endorsing religion where their presence is part of neutral program).

The district court properly found that the FUTA and RIESA exemptions had neither an impermissible purpose, nor an impermissible effect on religion. First, both the FUTA and the RIESA exemption provisions serve the secular purpose of facilitating the administration of the federal-state unemployment insurance program by excluding from coverage a variety of workers whose employment patterns are irregular or whose wages are not easily accountable. With regard to FUTA, Rojas concedes that the original purpose of the coverage exemptions was to address administrability concerns. She contends, however, that the current 26 U.S.C. § 3309, viewed in the wake of the 1970 and 1976 Amendments, reflects the purpose of favoring religion rather than the secular purpose of providing ease of administration. Rojas is unable to direct our attention to, nor can we find, any indications in the legislative history of the 1970 and 1976 Amendments that suggest an impermissible purpose of advancing religion in general or any particular religion. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489, 86 L.Ed.2d 29 (1985) ("[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."). Moreover, the current exemption for religious employment, even

after the amendments, still rests within the context of a variety of other exemptions, all of which appear to share a common secular purpose. Efficient administration of the unemployment compensation system is particularly enhanced through the exemptions for religion because it eliminates the need for the government to review employment decisions made on the basis of religious rationales. These considerations are also true of the exemptions listed in R.I. Gen. Laws § 28-42-8(1). The exemption for religions contained therein, when viewed in context, is innocuous. It appears to serve the interest in facilitating the administration of federal and state unemployment benefits programs, and Rojas can point to no other evidence that the "purpose that animated adoption" was to advance religion. *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 2578, 96 L.Ed.2d 510 (1987). In *Walz*, the Supreme Court upheld property tax exemptions for religious institutions, arguing that such exemptions, although not required by the Free Exercise Clause, were valid governmental actions "productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." 397 U.S. at 669, 90 S.Ct. at 1412. Including religious institutions within a set of unemployment tax exemption recipients – selected on the basis of reducing difficulties in administering an unemployment insurance program – reflects less of a desire to sponsor religion than the direct property tax exemptions upheld in *Walz*.

Rojas's brief on appeal places much weight on *Texas Monthly v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), which struck down a narrow Texas sales and use tax exemption for " 'periodicals that are published or

distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.' " *Id.* at 5, 109 S.Ct. at 894 (quoting Texas statute). Although *Texas Monthly* stands for the proposition that a subsidy that is granted only to religious publications and not to other similar publications "lacks sufficient breadth to pass scrutiny under the Establishment Clause," it also stated that "[i]nsofar as [a tax] subsidy is conferred upon a wide array of non-sectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." 489 U.S. at 14-15, 109 S.Ct. at 899. The exemption provisions at issue in the instant case fall within the latter category. We decline Rojas's invitation to read *Texas Monthly* as requiring that a provision incidentally benefitting religion *must* grant a like benefit to every group that could also conceivably fall within the secular rationale for the exemption provision. *Texas Monthly* nowhere requires this underinclusiveness analysis, but instead indicates that when a "wide array" of groups are benefitted by a provision that pursues a single, unifying, secular end, one of these groups may indeed be religious institutions. In *Texas Monthly*, the other Texas sales tax exemptions did not serve the same purpose as the narrow exemption for religious periodicals, and thus their existence could not rescue the challenged exemption. By contrast, an adequate array of groups are exempted under the FUTA and RIESA provisions, reinforcing our conclusion that the religious exemptions here serve the legitimate secular

purpose of facilitating the administration of the unemployment insurance system.[5]

The second basic Establishment Clause concern is that of avoiding the effective promotion or advancement of particular religions or of religion in general by the government. Although favoritism toward any particular sect is not an issue raised by this appeal, it is not disputed that religious institutions as a whole benefit from the FUTA and RIESA tax exemptions. An incidental benefit to religion does not, however, render invalid a statutory scheme with a valid secular purpose. *See, e.g., Agostini,* ___ U.S. at ___, 117 S.Ct. at 2014; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993); *Witters v. Washington Dept. of Servs.*, 474 U.S. 481, 488-89, 106 S.Ct. 748, 751-52, 88 L.Ed.2d 846 (1986); *Walz,* 397 U.S. at 664. The exemptions is not to force the general public to subsidize religion. Rather, the primary practical effect of the exemptions for religious

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[5] We therefore need not address the defendants' alternative legal argument in defense of the exemptions, namely that even were the exemption provided *only* to religions, it would still serve the legitimate secular purpose of decreasing governmental entanglement with religion. It is well established that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-day Saints v. Amos,* 483 U.S. 327, 335, 107 S.Ct. 2862, 2868, 97 L.Ed.2d 273 (1987) (upholding exemption for religious institutions from Title VII's prohibition against religious discrimination in employment for secular activities of a nonprofit). But again, we do not need to consider whether the exemptions at issue here are supported on this accommodation rationale.

institutions is to exclude former employees of such institutions from participating in the Rhode Island unemployment insurance system.

Finally, as the district court correctly reasoned, entanglement concerns are in fact reduced through the adoption of the exemptions in this case. *See* 928 F.Supp. at 165.

II. Equal Protection

With regard to Rojas's claim that the FUTA and RIESA tax exemptions for religious employers violate constitutional equal protection principles, we affirm the district court for substantially the grounds given in its opinion. *See* 928 F.Supp. at 166. Although Rojas recasts her equal protection claim slightly on appeal, arguing that the district court erred by focusing on the difference in treatment of employers rather than on the difference in treatment of employees of exempt and non-exempt entities, the rationality requirement under the equal protection clause is equally lenient from either vantage. The same considerations that led the district court to find no equal protection violation with regard to the difference in treatment of exempt and non-exempt employers applies to exempt and non-exempt employees as well.

CONCLUSION

For the reasons stated above, the decision of the district court is ***affirmed.***

Guadalupe ROJAS

v.

Lawrence FITCH, Individually and in His Capacity as Director of the Rhode Island Department of Employment and Training; The Salvation Army of Rhode Island, Inc., Defendant Intervenor; and Robert Reich, in His Official Capacity as Secretary, United States Department of Labor.

Civ. A. No. 94-0483B.

United States District Court,
D. Rhode Island.

June 7, 1996.

John William Dineen, Yesser, Glasson & Dineen, Providence, RI, for Plaintiff.

Rebecca Tedford Partington, William Kolb, Attorney General's Office, Providence, RI, Everett Samartino, U.S. Attorney's Office, Providence, RI, Scott Glabman, Office of the Solicitor, U.S. Dept. of Labor, Washington, D.C., Gerard Paul Cobleigh, Cobleigh, Watt, Rock & Giacobbe, Warwick, RI, Florence Barber, Cadwalader, Wickersham & Taft, New York City, Patricia Andrews, Providence, RI, for Defendant.

OPINION

FRANCIS J. BOYLE, Senior District Judge.

This action is a constitutional challenge to a federal statute and a Rhode Island statute which operate to exempt religious organizations from the payment of

Rhode Island State unemployment taxes. Plaintiff claims that the statutes violate the Establishment Clause, and the Equal Protection Clause of the United States Constitution, as well as, Article I, § 3 of the Rhode Island Constitution. Defendants contend that the action should be dismissed from the federal forum pursuant to the Tax Injunction Act and the doctrine of abstention. Federal defendant also contends that plaintiff lacks standing to bring this action against him. In the alternative, defendants argue that the statutes withstand constitutional scrutiny. For the following reasons, the defendants' procedural challenges to this action are rejected. The statutes, however, are found to be constitutional.

I. BACKGROUND

The Federal Unemployment Tax Act ("FUTA" or "the Act"), 26 U.S.C. §§ 3301-3311, establishes a cooperative federal-state scheme to provide benefits to unemployed workers. The Act requires employers to pay a federal excise tax equal to a percentage of wages paid to "covered" employees, but also entitles them to a credit on contributions paid into federally approved state unemployment compensation programs. 26 U.S.C. §§ 3301, 3302. Prior to 1970, FUTA excluded from the definition of covered employment "service performed in the employ of a religious, charitable, educational, or other [tax exempt] organization." This "exemption" meant that such organizations were not required to pay either federal excise taxes or state unemployment taxes.

In 1970, Congress amended FUTA, requiring state plans to cover employees of non-profit organizations,

state hospitals, and state institutions of higher education, thereby eliminating the broad state exemption available to non-profit organizations.[1] *See* Employment Security Amendments of 1970, Pub.L. 91-373, § 104(b)(1), 84 Stat. 697. At that same time, however, Congress enacted § 3309(b), exempting from mandatory state coverage a narrow class of religious and educational employees[2] as well as other specifically enumerated services. In 1976, Congress once again amended FUTA, eliminating the blanket state exemption for school employees contained in § 3309(b)(3), but retaining the exemptions for religious employees and other services.

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[1] Although nonprofit organizations are required to be covered by federally approved state unemployment compensation laws, they continue to be exempt from the federal excise tax on wages as § 3306(c)(8), excluding services performed for such organizations from the definition of "employment," has not changed.

[2] § 3309(b), at that time, exempted (in part) services performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education. [. . .] Pub.L. 91-373, § 104(b)(1), 84 Stat. 698.

Title 28, chapters 42-44 of the General Laws of Rhode Island comprise the Rhode Island Employment Security Act. The purpose of this act is to provide "for the accumulation of a fund to assist in protecting the public against the ill effects of unemployment . . . " R.I.G.L. § 28-42-2. Section 28-42-8 exempts certain types of employment from the requirements of the Employment Security Act. For instance, the statute exempts from coverage some domestic servants, golf caddies, certain insurance brokers and agents, as well as other services. R.I.G.L. § 28-42-8(1), (9) & (11). As pertains specifically to this action, § 28-42-8(4) exempts from Act coverage:

> (4) Service performed:
>
> (i) In the employ of:
>
> (A) A church or convention or association of churches or
>
> (B) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches . . . R.I.G.L. § 28-42-8(4)(I)(A) & (B) (Michie 1995).

Accordingly, religious organizations and churches which qualify as exempt under § 28-42-8(4) are not required to pay an unemployment tax.

The Salvation Army was founded in 1865 as an international religious and charitable organization. A fundamental belief of the Army is that the physical needs of a person must be administered to before that person can truly receive and accept spiritual guidance. Therefore, as

part of its religious mission, The Salvation Army conducts rehabilitative programs, maintains shelters for the homeless, soup kitchens, day care centers and provides many other charitable services. The Salvation Army has been deemed a "church" for tax purposes by both the federal government and the government of the State of Rhode Island. In 1955, the Internal Revenue Service ("IRS") determined that The Salvation Army constituted a "church or a convention or association of churches" for purpose of the Internal Revenue Code. Likewise, in 1987 the Rhode Island Department of Employment and Training determined that the Salvation Army was a "church" and thus entitled to an exemption pursuant to § 28-42-8(4)(a).

Plaintiff worked for The Salvation Army in Providence, Rhode Island from 1988 to 1994 with a brief interruption in 1990-91 during which she was employed by Catholic Social Services. During her time with The Salvation Army, she worked as a social case worker. On March 18, 1994, plaintiff was terminated due to "financial constraints."

Approximately one month later, plaintiff filed an application for unemployment insurance benefits with the Rhode Island Department of Employment and Training ("DET"). DET determined that plaintiff was ineligible for unemployment benefits due to the fact that her former employer was exempt under § 28-42-8(4) of the Rhode Island General Laws. Plaintiff appealed, and a hearing was held before a DET referee on May 12, 1994. At that hearing, plaintiff argued that The Salvation Army was not a "church" within the meaning of R.I.G.L. § 28-42-8(4), and that even if it was a church, § 28-42-8(4)

was violative of the First, Fourth and Fifteenth Amendments to the U.S. Constitution and Article I, § 3 of the Rhode Island Constitution.

The referee, in a decision dated June 6, 1994, affirmed the DET's denial stating in part, "claimant's wages are exempt under the provisions of Section 28-42-8(4) of the Employment Security Act [and] cannot be used to establish a valid Employment Security claim." Furthermore, the referee stated that based upon a review of the case law cited by plaintiff, the Rhode Island statute did not violate either the United States Constitution or the Rhode Island Constitution. Plaintiff appealed that decision to the DET Board of Review. In a decision dated August 16, 1994, the Board "approved and confirmed" the referee's decision.

On September 9, 1994, plaintiff initiated this action in the United States District Court for the District of Rhode Island by filing a complaint naming the Director of DET as defendant. In that complaint, plaintiff sought a judgment declaring R.I.G.L. § 28-42-8(4) as violative of the First, Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 3 of the Rhode Island Constitution.

Approximately one week later, plaintiff initiated a similar action in the District Court of the State of Rhode Island. That action, however, has been stayed by agreement of the parties pending a decision in the federal action.

In December of 1994, the Salvation Army moved without objection to intervene in this action on the grounds that it was a party to the DET proceedings and

that its exemption under § 28-42-8(4) is at issue. The motion was granted. In March of 1995, plaintiff moved to amend her complaint to add the Secretary of the United States Department of Labor on the grounds that § 3309(b) of FUTA was inextricably connected with the Rhode Island statute in question. This motion was also granted.

II. ANALYSIS

A. *Procedural Issues*

1. *Tax Injunction Act.*

Defendants first contend that this action should be dismissed from the federal forum under the Tax Injunction Act. This contention, however, is without merit.

The Tax Injunction Act provides:

> The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. 28 U.S.C. § 1341 (West 1993).

It is clear from the very text of the statute that it is not applicable in this instance. The present action is not an action to "enjoin, suspend or restrain" the collection of taxes. In fact, it is quite the opposite. This is, in essence, an action to compel the State of Rhode Island to collect taxes. *See Moton v. Lambert*, 508 F.Supp. 367, 368 (N.D.Miss.1981) (plaintiffs action to invalidate tax exemption for racially segregated schools was not enjoined because it was a "demand that taxes be collected and not enjoined").

Defendants rely on the 1982 United States Supreme Court case of *California v. Grace Brethren Church*, 457 U.S. 393, 408, 102 S.Ct. 2498, 2507-08, 73 L.Ed.2d 93 (1982), for their assertion that "the Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional." That reliance is misplaced. Justice O'Connor in the majority opinion specifically stated, "Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference in the *assessment and collection* of state taxes." *Id.* at 411, 102 S.Ct. at 2509 (emphasis added). *Grace Brethren* involved an action initiated by parties seeking a declaratory judgment to *enjoin* state *collection* of unemployment taxes on constitutional grounds. *Id.* at 398, 102 S.Ct. at 2502-03. The Court held that the Act prohibited a federal court from issuing a declaratory judgment holding a state tax law unconstitutional only if it would "in every practical sense operate to suspend collection of taxes." *Id.* at 408, 102 S.Ct. at 2508 (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299, 63 S.Ct. 1070, 1073, 87 L.Ed. 1407 (1943).) Accordingly, because this action does not seek to enjoin or suspend the assessment and collection of taxes, the Tax Injunction Act does not apply.

2. *Doctrine of Abstention.*

Defendants also contend that this action should be dismissed from the federal forum under the doctrine of abstention. The abstention doctrine is actually a collection of several legal theories under which a federal court should or may abstain from hearing an action otherwise properly brought in this forum. *See Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47

L.Ed.2d 483 (1976); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876 (1940). In a classic example of the "lets throw out as many theories as possible and hope one sticks to the wall" approach, defendants have argued that *all five* different theories of abstention are applicable to this case. All five arguments are without merit.

It should be noted initially that the doctrine of abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959). Thus, abstention can only be justified in exceptional circumstances. *Id.* at 188-89, 79 S.Ct. at 1063. Defendants first argue that the *Pullman* abstention doctrine applies to this action. This doctrine requires federal abstention when a state law is unclear and "a state court's resolution . . . would obviate the need for a federal constitutional ruling." *Pustell v. Lynn Public Schools*, 18 F.3d 50, 53 (1st Cir.1994); *see also Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236-37, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984). In this instance, however, there is no "unclear" state law. The state statute in question is unambiguous. All parties agree as to its meaning, and the only question before this court is whether that connotation is unconstitutional. As the Supreme Court has stated, "federal courts need not abstain on *Pullman* grounds when a state statute is not 'fairly subject to an interpretation

which will render unnecessary' adjudication of the federal constitutional question." *Hawaii Housing Authority*, 467 U.S. at 236, 104 S.Ct. at 2327 (quoting *Harman v. Forssenius*, 380 U.S. 528, 535, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965)). Accordingly, the *Pullman* doctrine is not applicable.

Defendants next argue that *Burford* abstention should apply. The *Burford* doctrine applies where "the state has a unified scheme for review of its administrative orders and federal intervention in cases in which diversity is present would have a disruptive effect on the state's efforts to establish a coherent policy on a matter of substantial public concern." 17A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4244 at 86. *Burford* type abstention has been held to be "generally limited to cases in which a federal court decision would 'disrupt a state administrative process . . . or unnecessarily enjoin state officials from executing domestic policies.' " *State Farm Fire & Cas. Co. v. Sweat*, 547 F.Supp. 233, 241 (N.D.Ga.1982) (quoting *Allegheny*, 360 U.S. at 189, 79 S.Ct. at 1063). Neither of these factors are present in this instance. First, plaintiff has exhausted her state administrative remedies without success. Thus, it cannot be said that the present action is interrupting the state administrative process. Secondly, while it could be argued that this is an action to "enjoin state officials from executing a domestic policy," the resolution of such a serious constitutional query can hardly be called "unnecessary." *See Allegheny*, 360 U.S. at 189, 79 S.Ct. at 1063; *Sweat*, 547 F.Supp. at 241. Accordingly, *Burford* type abstention does not apply.

Defendants next argue that abstention is required because a difficult question of state law is involved. Defendants cite to *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876 (1940), for their assertion that "a federal court must abstain to avoid deciding a difficult question of state law." This argument is completely without merit. First, *Thompson* does not stand for such a broad-based assertion. Secondly, even if it did, this action does not involve only a question of state law; this action also involves, in fact is dominated by, serious federal Constitutional issues which must be decided. Lastly, assuming *arguendo* that the state law question in this action is in fact difficult, the Supreme Court has stated that "difficulties and perplexities of state law are no reason for referral of the problem to the state court." *McNeese v. Board of Education for Community School District 187*, 373 U.S. 668, 673 n. 5, 83 S.Ct. 1433, 1436 n. 5, 10 L.Ed.2d 622 (1963) (citing *Meredith v. Winter Haven*, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943)). Thus, this argument is rejected.

Defendants next argue that *Younger* abstention should apply. The Supreme Court in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), established a theory of abstention under which a federal court should, under certain circumstances, abstain where federal jurisdiction has been evoked for the purpose of restraining state criminal proceedings against the federal plaintiff. Defendants are correct in stating that this doctrine has been extended to also protect state civil proceedings, but only under certain circumstances. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102

S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). Those circumstances are not present in this action. As the First Circuit has recently reiterated, *Younger* abstention is appropriate when "there is (1) an ongoing state judicial proceeding, instituted *prior* to the federal proceeding . . . , that (2) implicates an important state interest, and (3) provides an adequate opportunity for the plaintiff to raise the claims advanced in his federal lawsuit." *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 638 (1st Cir.1996) (citing *Middlesex County Ethics Comm.*, 457 U.S. at 432, 102 S.Ct. at 2521) (emphasis added). In this instance, the federal proceeding was brought prior to the state proceeding. Consequently, the assertion that *Younger* abstention applies is without merit.

The last type of abstention that defendants argue is applicable has come to be known as *Colorado River* type abstention. *See Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). While the Supreme Court did not see itself creating another abstention theory, *Colorado River*, 424 U.S. at 817-18, 96 S.Ct. at 1246, that is exactly what lower courts have interpreted the *Colorado River* decision to mean. *See, e.g., Ash v. Richard J. Lynch & Co.*, 644 F.Supp. 315, 317 ("In *Colorado River* . . . the Supreme Court conferred legitimacy on a 'fourth type' of abstention"). Under this theory, a federal court should abstain to avoid duplicative litigation. 17A Wright, Miller & Cooper, *Federal Practice and Procedure* § 4247 at 117. This type of abstention, however, is not freely exercised. *See, e.g., Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325, 327 (2d Cir.1986); *Ash*, 644 F.Supp. at 317. In fact, the *Colorado River* Court cautioned that such action should only be

undertaken under exceptional circumstances. *Id.* at 818, 96 S.Ct. at 1246-47. In this instance, notwithstanding the fact that there would be no duplicative litigation due to the fact that state court proceedings have been stayed, no such exceptional circumstances exist to warrant *Colorado River* type abstention. Therefore, this argument is also rejected. Accordingly, none of the theories of abstention apply to this action.

3. *Standing to Bring Action Against Federal Defendant.*

Federal defendant, Secretary of Labor, has moved to dismiss the claim against him on the grounds that plaintiff has failed to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). Federal defendant asserts that plaintiff lacks standing, because the exemptions under FUTA are permissive and not mandatory. That is, that the exemptions merely permit a state to exclude religious organizations from coverage, but do not mandate such an exclusion. Accordingly, the federal defendant argues that it is the state and state alone that has denied plaintiff benefits, and it is the state and state alone which can redress plaintiff's alleged injury.

Plaintiff, on the other hand, argues that FUTA requires states to exempt religious employers from federally approved state unemployment programs, and accordingly, the Secretary of Labor can redress the problem. Plaintiff misinterprets the provisions of FUTA. FUTA mandates state coverage of all employees except those enumerated in § 3309(b). That is, states must, in order to have a federally approved unemployment compensation

program, cover employees who perform all services except those specifically exempted. *See* 26 U.S.C. § 3309(b). However, while FUTA does not mandate state coverage of those employees listed in § 3309(b), it does not prohibit states from taxing excluded services and organizations. *See St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 775 n. 3, 101 S.Ct. 2142, 2144 n. 3, 68 L.Ed.2d 612 (1981); *see also Employment Div. v. Rogue Valley Youth for Christ*, 307 Or. 490, 770 P.2d 588, 589 n. 3 (1989) ("nothing in FUTA prohibits Oregon from taxing even excluded organizations"). In other words, FUTA permits, but does not mandate, state exclusion of those services enumerated in § 3309(b).

It does not follow, however, from such a determination that plaintiff lacks standing to sue the federal defendant. In order to have standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). In this instance, the alleged unlawful conduct (the unconstitutional denial of unemployment benefits) is not only "fairly traceable" but is directly traceable to the federal statute. *Id.* While FUTA does not mandate an exemption for churches and religious organizations, it does permit such an exemption. If FUTA did not provide for such an exemption, a state could not exclude religious groups from unemployment coverage and still be in compliance with FUTA.

Federal defendant's assertion that FUTA compliance is voluntary for each state, while true, is of no consequence. There are heavy incentives for states to maintain

FUTA compliant unemployment compensation programs. That is why all 50 states have chosen to do so. It is not only unlikely, but highly unlikely, that an amendment to 26 U.S.C. § 3309(b) removing churches and religious organizations from the exemption would cause any states to opt out of FUTA. Thus, it is also clear that a finding that § 3309(b) is unconstitutional is likely to redress the plaintiff's alleged injuries. *See Allen*, 468 U.S. at 751, 104 S.Ct. at 3324. Accordingly, federal defendant's motion to dismiss is denied.

B. ***Constitutional Analysis***

1. *Establishment Clause.*

The First Amendment to the United States Constitution provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " U.S. CONST. amend I. These provisions, more commonly known as the Establishment and Free Exercise Clauses, are also applicable to the States through the Fourteenth Amendment. *See Abington School District v. Schempp*, 374 U.S. 203, 215-16, 83 S.Ct. 1560, 1567-68, 10 L.Ed.2d 844 (1963). The purpose of the Establishment Clause is to ensure that government will not sponsor or promote any particular religion. *See Walz v. Tax Comm'n*, 397 U.S. 664, 669, 90 S.Ct. 1409, 1411-12, 25 L.Ed.2d 697 (1970). Conversely, the purpose of the Free Exercise clause is to safeguard the free exercise of a chosen form of religion. *Id.* Plaintiff brings this action under the former clause, arguing that the statutes in question promote religion.

The Establishment Clause has been said to have been intended to erect "a wall of separation between church and state." *McCollum v. Board of Education*, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948) (quoting *Everson v. Board of Education*, 330 U.S. 1, 16, 67 S.Ct. 504, 512, 91 L.Ed. 711 (1947)). In 1971, in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), the Supreme Court identified a three-part test it distilled from prior Establishment Clause jurisprudence to determine whether or not that wall has been traversed. Under the *Lemon* test, in order for a statute to survive an Establishment Clause challenge it: (1) must have a secular legislative purpose; (2) must have as its principle or primary effect one that neither advances or prohibits religion; and (3) must not foster excessive government entanglement with religion. *Id.*

Although the continuing validity of the *Lemon* test has been questioned recently, the Supreme Court has never overruled it, and lower courts continue to apply it to Establishment Clause jurisprudence. *See, e.g., Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir.1993), *reh'g denied*, 12 F.3d 221, *cert. denied*, ___ U.S. ___, 115 S.Ct. 54, 130 L.Ed.2d 13; *Bd. of Educ. of City of Chicago v. Alexander*, 983 F.2d 745 (7th Cir.1992); *Fordham Univ. v. Brown*, 856 F.Supp. 684 (D.D.C.1994); *Clever v. Cherry Hill Bd. of Educ.*, 838 F.Supp. 929 (D.N.J.1993). Accordingly, the statutes in question will be examined by parsing them in light of the three prongs of *Lemon*.

The first prong is known as the "purpose prong." This prong focuses on the actual purpose behind the government legislation and asks whether that purpose is

to endorse or disapprove of religion. *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 2578, 96 L.Ed.2d 510 (1987). The Supreme Court has frequently noted that the fact that religious organizations benefit from legislation is of no consequence so long as the legislation has an "overall secular purpose." *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10, 14-15 & n. 4, 109 S.Ct. 890, 897, 899 & n. 4, 103 L.Ed.2d 1 (1989); *Walz*, 397 U.S. at 664, 90 S.Ct. at 1409. In determining if there is an overall secular purpose, the court "focuses on the purpose that animated *adoption* of the [legislation]." *Aguillard*, 482 U.S. at 585, 107 S.Ct. at 2578 ("a governmental intention to promote religion is clear when the State *enacts* a law to serve a religious purpose") (emphasis added). Thus, a court faced with an Establishment Clause challenge must look to the purpose of the questioned legislation as it was first enacted.

The original purpose of the provisions at issue in this case was to facilitate the administration of the federal and state unemployment programs by excluding from coverage those workers who were not recognized as full members of the permanent and stable workforce. That this original purpose is secular can not and has not been challenged by the plaintiff.[3] Plaintiff contends, however, that amendments to the statutes over the years have eliminated many of the non-religious exemptions, and thus, the statutes' purpose *now* offends the Establishment

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[3] Plaintiff states in its memo, "If this broad exemption were still the law, the statutes at issue would survive First Amendment Scrutiny . . . "

Clause. This contention is without merit. Notwithstanding the fact that the statutes still provide exemptions to non-religious as well as religious services and employers, the purpose of the statutes remain as they were when the statutes were first enacted.[4]

It must be noted that even if the purpose and intent of the statutes were to be evaluated with the statutes as they are in effect today, and not when they were first enacted, they would still pass muster under the first prong of *Lemon*. The FUTA exemptions are not "confined to religious organizations." *See Texas Monthly*, 489 U.S. at 11, 109 S.Ct. at 897. FUTA, as it reads now, exempts from mandatory state unemployment coverage services performed by:

> – employees of churches or church affiliated religious organizations, *see* 26 U.S.C. § 3309(b)(1);
>
> – ministers and members of religious orders, *see* 26 U.S.C. § 3309(b)(2);
>
> – state and local elected officials, legislators, members of the judiciary, temporary emergency employees and certain major policy makers or advisors, and State National Guard or Air National Guard, *see* 26 U.S.C. § 3309(b)(3);

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[4] That is not to say that legislation with an originally secular purpose cannot ever be amended such that it would violate the Establishment Clause. Such a challenge, however, would be more properly brought under the second prong of *Lemon*, for as the purpose of a statute remains unaffected by amendments, its effect may not.

– employees with impaired physical and/or mental capabilities who are working in facilities that provide such individuals rehabilitation or renumerative work, *see* 26 U.S.C. § 3309(b)(4);

– participants in state, local, federal or federally assisted work-relief or work-training programs, *see* 26 U.S.C. § 3309(b)(5);

– inmates of custodial or penal institutions, *see* 26 U.S.C. § 3309(b)(6);

– all employees in nonprofit organizations that do not employ at least four employees at least twenty days a year, *see* 26 U.S.C. § 3309(c).

Likewise, the Rhode Island Employment Security Act exempts not only service performed in the employ of churches or religious organizations, but also:

– domestic service in a private home for which the employee does not receive at least $1000.00 per year, *see* R.I.G.L. § 28-42-8(1);

– service performed by a parent for a child, by a spouse for a spouse or by a minor child for a parent, *see* R.I.G.L. § 28-42-8(2);

– certain service performed in the employ of a state government (other than Rhode Island) or federal government, *see* R.I.G.L. § 28-42-8(3);

– services performed by employees with impaired physical and/or mental capabilities who are working in facilities that provide such individuals rehabilitation or renumerative work, *see* R.I.G.L. § 28-42-8(4)(iii);

– services performed by participants in state, local, federal or federally assisted work-relief or work-training programs, *see* R.I.G.L. § 28-42-8(4)(iv);

– services performed in a hospital by a patient of the hospital, *see* R.I.G.L. § 28-42-8(4)(v);

– services performed by an inmate of a custodial or penal institution, *see* R.I.G.L. § 28-42-8(4)(vi);

– services which are occasional, irregular or incidental and are not in the course of an employer's trade or business, *see* R.I.G.L. § 28-42-8(8);

– service as an "independent" golf caddy, *see* R.I.G.L. § 28-42-8(9);

– services performed by certain commission only real estate salespersons, *see* R.I.G.L. § 28-42-8(10);

– services performed by certain commission only insurance brokers, agents or sub agents, *see* R.I.G.L. § 28-42-8(11);

– services performed by students in co-op work programs, *see* R.I.G.L. § 28-42-8(12);

– services performed by certain workers on small fishing vessels, *see* R.I.G.L. § 28-42-8(13).

It is abundantly clear that neither of these statutes, on their face, manifest any governmental intent or purpose to advance or promote religion. Instead it is clear that the statutes reflect a wholly secular purpose. That purpose is, as it always has been, the facilitation of the administration of the federal and state unemployment benefits programs by excluding employees who are typically not fully active or permanent members of the stable workforce. The amendments to these statutes do not

reflect, as plaintiff would suggest, an increasing governmental interest in the promotion of religion. Instead the amendments reflect government's recognition of the increasing role that certain non-profit organizations have in our society as a whole and more specifically in providing members of the stable workforce. Thus, absolutely no sectarian purpose is evinced by these statutes. Any religious benefit that results as a consequence of this secular purpose is purely incidental. Accordingly, the first prong of the *Lemon* test is met.

The second prong of *Lemon* requires that the challenged statute must not have a principle or primary effect that either advances or inhibits religion. 403 U.S. at 612, 91 S.Ct. at 2111. This does not mean that a law is unconstitutional because it allows churches to advance religion. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337, 107 S.Ct. 2862, 2869, 97 L.Ed.2d 273 (1987). The *Amos* Court pointed out that many laws that have been held constitutional have allowed religious groups to more ably advance their purposes. *Id.* at 336, 107 S.Ct. at 2868. The statutes in question here are no exception. Without question, the FUTA and Rhode Island Employment Security Act exemptions benefit religious organizations by not compelling them to pay unemployment taxes. It could even be said that the exemptions may allow religious groups to better advance their purposes because of the monetary savings involved. This, however, is not unconstitutional. *See Amos*, 483 U.S. at 336-37, 107 S.Ct. at 2868-69.

In order for a law's effects to run afoul of the second prong of *Lemon*, "it must be fair to say that the *government itself* has advanced religion through its own activities and

influence." *Id.* at 337, 107 S.Ct. at 2869 (no emphasis added). In this instance, it can hardly be said that the governments' actions (i.e.: unemployment tax exemptions) advance religion.[5] No reasonable person is likely to form a religious belief based in any part on the fact that the organization does not have to pay unemployment taxes. It would be ludicrous to say that this exemption would compel "nonadherents to support the practices or proselytizing of . . . religious organizations." *Texas Monthly*, 489 U.S. at 9, 109 S.Ct. at 896. Additionally, as noted above, the statutes in question provide exemptions to non-religious groups and services as well. Thus, the primary effect of the statutes is not to advance religion, and the second prong of *Lemon* is not offended.

The third prong of the *Lemon* test provides that a statute must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 613, 91 S.Ct. at 2111. The Supreme Court has held that the excessive entanglement prong of *Lemon* "prohibits intrusive government inquiry into religious belief." *Amos*, 483 U.S. at 339, 107 S.Ct. at 2870. The Court has also stated that this leads to a query of "whether the [government] involvement . . . is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz v. Tax Commission of New York*, 397 U.S. 664, 675, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970). The statutes in question here lead to the exact

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[5] In fact, to the contrary, it might be argued that because of the exemptions, religious organizations are at a disadvantage in being able to hire employees because they won't be covered by unemployment benefits.

opposite result. Rather than promoting entanglement with religion the statutes foster the separation of church and state that the First Amendment requires. Because of the statutes, the federal government and state government need not continuously monitor and audit exempt religious organizations to ensure compliance with FUTA and the Rhode Island Employment Security Act. In fact, the Supreme Court addressed this very issue in *Walz*, stating that the primary effect of a tax exemption was not to sponsor religious activity but to "restrict the fiscal relationship between church and state" and to "complement and reinforce the desired separation insulating each from the other." 397 U.S. at 676, 90 S.Ct. at 1415; *see also Texas Monthly*, 489 U.S. at 43, 109 S.Ct. at 914-15 (Scalia J., dissenting). Accordingly, the statutes do not promote excessive government entanglement in matters of religion, and the third and final prong of *Lemon* is met.

Plaintiff relies heavily on the Supreme Court's opinion in *Texas Monthly v. Bullock*, supra. That reliance, however, is misplaced. First, this case is easily distinguished. Most importantly, the statute at issue in *Texas Monthly* exempted *only* religious organizations. 489 U.S. at 14, 109 S.Ct. at 899. As noted above, that is simply not so in this case. Additionally, the Supreme Court made particular note of the fact that the exemption in *Texas Monthly* was only "targeted at writings that *promulgate* the teachings of religious faiths." *Id.* at 13, 15, 109 S.Ct. at 898, 899-900. (emphasis not added). Again that is not so in this case. Nevertheless, plaintiff also contends that *Texas Monthly* stands for the proposition that if tax exemptions extend to religious organizations, they *must* also extend to a broad array of non-profit organizations in order to be

constitutional. That, however, is not correct. The Court in *Texas Monthly* specifically stated, "[h]ow expansive the class of exempt organizations or activities must be to withstand constitutional assault depends upon the State's secular aim in granting a tax exemption." 489 U.S. at 15, 109 S.Ct. at 900. In this instance the list of exempt services and organizations is wholly consistent with the secular purpose as noted above. Accordingly, the statutes in question do not run afoul of the Supreme Court's decision in *Texas Monthly,* and more importantly, also pass muster under the *Lemon* test. Thus, they do not violate the Establishment Clause of the First Amendment to the United States Constitution.

2. *Equal Protection*

Plaintiff also argues that the exemptions violate the Equal Protection Clause. Because the statutes in question are rationally related to a legitimate interest, this claim also fails.

There is no fundamental right to the payment of unemployment benefits, and there is no suspect or quasi-suspect classification involved. Accordingly, in order to withstand an equal protection challenge, the statutory exemptions in question here need only be rationally related to a legitimate governmental interest. *Ohio Bureau of Employment Servs. v. Hodory,* 431 U.S. 471, 489, 97 S.Ct. 1898, 1908-09, 52 L.Ed.2d 513 (1977). This burden is met.

It has long been held that "[n]either due process nor equal protection imposes upon a state any rigid rule of equality of taxation." *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245

(1937). So long as a distinction rests upon a rational basis, inequalities which result from singling out a particular class or classes for taxation or exemptions are not unconstitutional. *Id.* This rational-basis standard is a relaxed standard which reflects the belief that creating distinctions is an unavoidable legislative task. *Hodory*, 431 U.S. at 489, 97 S.Ct. at 1908-09. Therefore, when a statute does not involve a fundamental interest or affect with particularity a protected class, it is presumed to be valid. *Id.*

In this instance, the purposes behind the religious exemptions of FUTA and the Rhode Island Employment Security Act are noted above. Additionally, the statutes promote the efficient administration of Rhode Island's unemployment insurance program by avoiding undue government involvement in problems peculiar to religious employment. *See Claim of Klein*, 78 N.Y.2d 662, 578 N.Y.S.2d 498, 504, 585 N.E.2d 809, 815 (1991). The statutes are rationally related to these legitimate governmental purposes. Thus, the Equal Protection Clause is not offended.

3. *Rhode Island Constitution*

Plaintiff also contends that R.I.G.L. § 28-42-8(4) violates Article I, § 3 of the Rhode Island Constitution. Article I, § 3 is titled "Freedom of Religion" and provides in relevant part:

> " . . . no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person's voluntary contract; nor enforced restrained, molested, or burdened in body or goods; nor disqualified from holding any office;

> nor otherwise suffer on account of such person's religious belief; and that every person shall be free to worship God according to the dictates of such person's conscience, and to profess and by argument to maintain such person's opinion in matters of religion; and that the same shall in n [sic] wise diminish, enlarge, or affect the civil capacity of any person." (Michie 1987)

For the following reasons, the religious exemptions to the Rhode Island Employment Security Act do not offend the above provision.

A federal court, in deciding a question of state law, sits in place of the highest state court and must discern how that court would decide the state issue. *See Oresman v. G.D. Searle & Co.*, 321 F.Supp. 449, 453 (D.R.I.1971). In this instance, however, that is not necessary as the Supreme Court of Rhode Island has already decided the issue of whether tax exemptions for religious organizations violate the Rhode Island Freedom of Religion Clause. In the 1961 case of *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961), the Rhode Island Supreme Court had before it the question of whether or not an exemption for religious organizations from the payment of property taxes offended Article I, § 3 of the State Constitution. In deciding that the Freedom of Religion Clause was not violated, the court noted that exemptions for churches and religious groups "were common prior to as well as after the adoption of [the Rhode Island] constitution in 1842." *Id.*, 176 A.2d at 77. Thus, the relevant inquiry was whether the people intended, by adopting Article I, § 3, to prohibit to the legislature the authority to exempt religious organizations from certain tax burdens. *Id.* The Rhode Island Supreme Court

answered that query in the negative. *Id.* A federal court is "bound . . . by the actual expression of the state's highest court" on issues of state law. *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 115-16 (1st Cir.1988), *cert. denied*, 490 U.S. 1107, 109 S.Ct. 3158, 104 L.Ed.2d 1021 (1989). Accordingly, the religious exemptions of R.I.G.L. 28-42-8(4) do not offend the Freedom of Religion Clause of the Rhode Island Constitution.

III. CONCLUSION

For the foregoing reasons, the provisions of FUTA and the Rhode Island Employment Security Act exempting religious organizations and churches from the payment of unemployment benefit taxes are held to be constitutional under both the United States Constitution and the Rhode Island Constitution.

So Ordered.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2328

GUADALUPE ROJAS,
Plaintiff-Appellant,

v.

LAWRENCE FITCH, ET AL.,
Defendants-Appellees.

No. 97-1089

GUADALUPE ROJAS,
Plaintiff-Appellee,

V.

DR. LEE H. ARNOLD, ET AL.,
Defendants-Appellants.

BEFORE

TORRUELLA, Chief Judge,
CAMPBELL, Senior Circuit Judge,
SELYA, BOUDIN, STAHL AND LYNCH, Circuit Judges.

ORDER OF COURT

Entered: December 18, 1997

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said

judges not having voted to order that the appeals be heard or reheard by the court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

PHOEBE D. MORSE, CLERK

By: /s/ Janice M. O'Men
Chief Deputy Clerk

[cc: Messrs. Dineen, Glabman, Dolan and Ms. Partington]

26 U.S.C.S. § 3309. State law coverage of services performed for nonprofit organizations or governmental entities.

(a) State law requirements. For purposes of section 3304(a)(6) –

(1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are –

(A) services excluded from the term "employment" solely by reason of paragraph (8) of section 3306(c), and

(B) services excluded from the term "employment" solely by reason of paragraph (7) of section 3306(c), and

(2) the State law shall provide that a governmental entity or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such times as may be provided by State law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizations so electing will make the payments required under such elections.

(b) Section not to apply to certain service. This section shall not apply to service performed –

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization, which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a governmental entity referred to in paragraph (7) of section 3306(c), if such service is performed by an individual in the exercise of his duties –

(A) as an elected official;

(B) as a member of a legislative body, or a member of the judiciary, of a State or political subdivision thereof;

(C) as a member of the State National Guard or Air National Guard;

(D) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or

(E) in a position which, under or pursuant to the State law, is designated as (i) a major nontenured, policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week;

(4) in a facility conduced for the purpose of carrying out a program of –

(A) rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or

(B) providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving such rehabilitation or remunerative work;

(5) as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a State or political subdivision thereof, by an individual receiving such work relief or work training; and

(6) by an inmate of a custodial or penal institution.

(c) Nonprofit organizations must employ 4 or more. This section shall not apply to service performed during any calendar year in the employ of any organization unless on each of some 20 days during such calendar year or the preceding calendar year, each day being in a different calendar week, the total number of individuals who were employed by such organization in employment (determined, without regard to section 3306(c)(8) and by excluding service to which this section does not apply by reason of subsection (b)) for some portion of the day (whether or not at the same moment of time) was 4 or more.

Rhode Island General Laws

28-42-8. Exemptions from "employment" – The term "employment" shall not include:

(1) Domestic service in a private home performed for a person who did not pay cash remuneration of one thousand dollars ($1,000) or more in any calendar quarter after December 31, 1977, in the current calendar year or the preceding calendar year to individuals employed in that domestic service in a private home;

(2) Service performed by an individual in the employ of his or her son, daughter, or spouse, and service performed by a child under the age of eighteen (18) in the employ of his or her father or mother;

(3) Service performed in the employ of any other state or any political subdivision thereof, the United States government, an instrumentality of any other state or states or their political subdivisions, or of an instrumentality of the United States, except that if the congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation act, then, to the extent permitted by congress, and from and after the date as of which permission becomes effective, all of the provisions of chapters 42 – 44 of this title shall be applicable to those instrumentalities and to services performed for those instrumentalities, in the same manner, to the same extent, and on the same terms as to all other employers, employing units, individuals, and services; provided, that if this state should not be certified by the secretary of labor under 26 U.S.C. § 3304 for any year, then the payments required of those

instrumentalities with respect to that year shall be deemed to have been erroneously collected within the meaning of § 28-43-12 and shall be refunded by the director from the fund in accordance with § 28-43-12;

(4) Service performed:

(i) In the employ of:

(A) A church or convention or association of churches, or

(B) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by that order;

(iii) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age, physical or mental deficiency, or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving that rehabilitation or remunerative work;

(iv) As part of an unemployment work relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving that work relief or work training;

(v) In the employ of a hospital by a patient of the hospital; or

(vi) By an inmate of a custodial or penal institution;

(5) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress; provided, that the director is hereby authorized and directed to enter into agreements with the proper agencies under that act of congress, which agreements shall become effective ten (10) days after publication thereof as in the manner provided in § 28-42-34 to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under chapters 42 – 44 of their title acquired rights to unemployment compensation under that act of congress, or who have, after acquiring potential rights to unemployment compensation under that act of congress, acquired rights to benefits under those chapters;

(6) Service covered by an election duly approved by the agency charged with the administration of any other state or federal employment security law in accordance with an arrangement pursuant to § 28-42-58 during the effective period of that election, except as provided in § 28-42-3(15)(i);

(7) Services performed by an individual in any calendar quarter on or after January 1, 1972 in the employ of any organization exempt from income tax under 26 U.S.C. § 501(a) (other than services performed for an organization defined in § 28-42-3(24) or for any organization described in 26 U.S.C. § 401(a) or under 26 U.S.C. § 521) if

the remuneration for that service is less than fifty dollars ($50.00);

(8) Service which is occasional, incidental, and occurs irregularly, and is not in the course of the employing unit's trade or business; provided, however, that service for a corporation shall not be excluded;

(9) Service as a golf caddy, except as to service performed solely for a club with respect to which the club alone bears the expense; and a golf caddy, except as in this subdivision specifically provided, shall not be construed to be an "employee" as defined in § 28-42-3(14);

(10) Notwithstanding any provisions of titles 5 and 27, service performed by an individual as a real estate salesperson if all the service performed by that individual is performed for remuneration solely by way of commission;

(11) Notwithstanding any provisions of titles 5 and 27, service performed by an individual as an insurance broker, agent, or sub-agent if all the service performed by that individual is performed for remuneration solely by way of commission; provided, however, that this exemption shall not apply to service performed as industrial and debit insurance agents;

(12) Service performed by an individual who is enrolled at a non-profit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regular organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program, taken for credit at that institution which combine

academic instruction with work experience, if that service is an integral part of that program, and that institution has so certified to the employer, except that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers; and

(13) Service performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of that boat pursuant to which:

(i) That individual does not receive any cash remuneration other than a share of the boat's catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of that catch; and

(ii) The operating crew of that boat is normally made up of fewer than ten (10) individuals.

(14) Services performed by a member of an Americorp program.

Supreme Court, U.S.
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No. 97-1550

In The

Supreme Court of the United States

October Term, 1997

GUADALUPE ROJAS,

Petitioner,

v.

LAWRENCE FITCH, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Rhode Island's grant of an exemption from the payment of unemployment taxes to "a church or convention or association of churches" included in a list of numerous other exemptions which are all secular in nature, violates the Establishment Clause of the First Amendment.

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STATUTES

U.S. Const. amend. I

R.I. Gen. Laws § 28-42-8(4)

STATEMENT OF THE CASE

Petitioner Guadelupe Rojas (hereinafter "Rojas") is a former employee of The Salvation Army in Rhode Island. During the period of her employment, The Salvation Army was exempt from the payment of unemployment taxes, pursuant to R.I. Gen. Laws § 28-42-8(4)(i)(A).[1] Rhode Island's legislative scheme was formulated pursuant to the Federal Unemployment Tax Act (hereinafter "FUTA") 26 U.S.C. § 3301-3311. The latter provides a system to assist unemployed members of this country's workforce, and provides its own exemption for churches.

In addition to providing an exemption for churches and religious organizations, Rhode Island provides a laundry-list of unmistakably secular exemptions to its unemployment tax scheme, including certain types of

[1] That section exempts service performed in the employ of "[a] church or convention or association of churches . . . " from the unemployment compensation system.

domestic service (28-42-8(1)); those working for their son, daughter or spouse, or children working for their father or mother (28-42-8(2)); employment by another state, any political subdivision thereof or the United States government (28-42-8(3)); certain employment rehabilitation facilities for disabled individuals (28-42-8(4)(iii)); service performed as part of an unemployment work relief or work training program (28-42-8(4)(iv)); service performed by a patient of a hospital in the employ of a hospital (28-42-8(4)(v)); or service by an inmate of a custodial or penal institution (28-42-8(4)(vi)). Additional exemptions are listed in subsections 5, 6, 7 and 8 of R.I. Gen. Laws § 28-42-8. Other interesting exemptions are services as a golf caddy, real estate salesman, insurance broker, student or employee on a boat in certain instances. R.I. Gen. Laws § 28-42-8(9), (10), (11), (12), and (13). All in all, there are 13 broad exemptions to the payment of unemployment compensation tax found in § 28-42-8. Still other exemptions are provided in R.I. Gen. Laws § 28-42-10 (students), employees of agents and contractors of employing units (§ 28-42-11) and certain employees of governmental entities (§ 28-42-14).

In March of 1994, Rojas was terminated from her employment. She filed for unemployment benefits, which were denied since her employer had not paid into the system, per the exemption. In 1994, Rojas filed an action in the United States District Court for the District of Rhode Island against the Director, seeking a declaration that R.I. Gen. Laws § 28-42-8(4)(i) was unconstitutional, as an "establishment" of religion forbidden by the First Amendment to the Constitution of the United States, and that the provisions exempting churches from the payment

of unemployment compensation taxes violated her right to equal protection of the laws. Rojas also included a claim under Rhode Island's religious freedom guarantee, found in this State's Constitution at Article I, § 3. Later in the proceedings, Rojas joined the Secretary of the United States Department of Labor as a defendant, and the Salvation Army was allowed to intervene as a defendant.

The District Court declined to find that either the Federal or State statutes attacked violated the Establishment Clause, or the Equal Protection Clause. The District Court applied the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and held that the exemption has a "wholly secular purpose", did not have a principle or primary effect that either advanced or inhibited religion, or that the exemption resulted in excessive entanglement between the church and the State. *Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996). On appeal, the First Circuit affirmed, finding that both the federal as well as the State exemption provisions withstood constitutional scrutiny. *Rojas v. Fitch*, 127 F.3d 184 (1st Cir. 1997). Both courts correctly recognized that the overarching secular purpose advanced by the exemption scheme was the effective administration of federal and state unemployment benefits programs. 127 F.3d at 188 (Petitioner's Appendix 10)[2] 928 F. Supp. at 163 (App. 33).

During the appeal of this matter, and in her Petition, Rojas asserts that the parties submitted a Joint Stipulation of Facts to the District Court in lieu of a trial. While some

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[2] References to Petitioner's Appendix are hereinafter designated "App.".

of the facts contained in her recitation are not disputed, neither the Director nor any other Defendant agreed to the entire list of facts set forth in the Petition at pages 4 - 8. The Director submits that the facts that are properly considered as relevant to the Petition are those found in the decision of the First Circuit, and no others.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Petitioner's application for a writ of certiorari, since she has not, and cannot, point to a split in the Circuits that requires this Court's resolution. The decision of the First Circuit does not conflict with any decision of this Court, and is not in conflict with any decision of any other Circuit Court of Appeals or of any state court of last resort. Finally, the Petition should be denied, since the First Circuit correctly determined that R.I. Gen. Laws § 28-42-8(4)(i)(A) does not violate the Establishment Clause of the First Amendment to the United States Constitution.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI.

Rule 10 of the Supreme Court Rules provides that a writ of certiorari is a matter for judicial discretion, and will be granted *only* for compelling reasons. Rule 10 emphasizes that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law, as Rojas does in

the instant petition. Rojas did not even attempt to demonstrate a compelling reason for this Court to undertake a review of the constitutionality of two statutes – one federal and one state. She instead leaps over that hurdle, and launches directly into her beliefs as to the constitutionality of the statute.

There is no reason for this Court to grant Petitioner's application for a writ of certiorari as the First Circuit's decision does not conflict with any decision of this Court, and is not in conflict with any decision of any other Circuit, or with a decision of any state court of last resort. The provisions at issue have been operating without excessive entanglement of church with state for some sixty years, and there is no need for this Court's review at this time. Further, the petition should be denied since the First Circuit correctly allocated the burden of proof, and correctly applied the three-part test articulated in *Lemon v. Kurtzman, supra.*

II. THE FIRST CIRCUIT CORRECTLY PLACED THE BURDEN OF PROOF, AND PROPERLY APPLIED THE THREE-PART TEST FOR ESTABLISHMENT CLAUSE CASES.

A. Rojas Bore the Burden of Proving That the Provisions of R.I. Gen. Laws § 28-42-8(4)(i)(A) Violated the Establishment Clause of the First Amendment.

It is beyond dispute that the provisions of R.I. Gen. Laws § 28-42-8(4) enjoy the presumption of constitutional validity. *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26 (1st Cir. 1993); *Chestnut v. Magnusson,* 942 F.2d 820 (1st Cir. 1991);

Donahue v. Rhode Island Department of Mental Health, Retardation and Hospitals, 632 F. Supp. 1456 (D.R.I. 1986). It is incumbent to give effect, if possible, to a state statute. *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220 (D.R.I. 1982). A party challenging the constitutionality of a statute has the burden of not just proving unconstitutionality, but proving it **beyond a reasonable doubt.** *Cardi Corp. v. State*, 524 A.2d 1092 (R.I. 1987); *Giebink v. Fischer*, 709 F. Supp. 1012 (D.Colo. 1989); *Villanueva v. Carere*, 873 F. Supp. 434 (D.Colo. 1994). The Federal Courts do not sit as a "super-legislature" to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *Griswold v. Connecticut*, 381 U.S. 479 (1965). This is in keeping with the well-settled maxim that courts are "reluctant to attribute unconstitutional motives to the States [in a First Amendment inquiry], particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute". *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

In a post-trial memo, Rojas raised for the first time the argument that it was for the governmental defendants to proffer evidence of a secular legislative purpose, in order to defeat her claims. This is clearly an incorrect standard. In a constitutional challenge such as this, the burden is on the challenger to prove a constitutional deficiency. The enacting body is not required to provide empirical evidence for its legislative judgment. *Rodriguez v. Secretary of Health, Education & Welfare*, 644 F.2d 918 (1st Cir. 1981); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman, supra; Gilette v. U.S.*, 401 U.S. 437 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Zorach v. Clauson*, 343 U.S. 306 (1952).

As stated previously, State legislatures are presumed to have acted within their constitutional powers. *McGowan v. Maryland*, 366 U.S. 420 (1961). Rojas contends that the state should have produced empirical evidence of a secular purpose supporting the exemption, citing *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995). In *Metzl*, the defendant argued in favor of the constitutionality of a school district's observance of Good Friday as a holiday. He interposed as the statute's secular purpose the fact that it would not be cost-efficient to keep schools operating when so few students would attend. However, no evidence was produced to support this extremely fact-intensive defense. The Seventh Circuit declined to accept this argument on its face, with no support. Since the Respondents herein have offered no such fact-intensive defense, and since the *Metzl* opinion stands alone in shifting the burden of proof away from the plaintiff, it should not be considered authoritative. *See Granzeier v. Middleton*, 955 F. Supp. 741 (E.D.Ky. 1997) (declining to apply *Metzl*, since it was very fact specific and based on an inadequate factual record).

B. The Exemption Is Constitutionally Permissible.

A statute or governmental action is consistent with the Establishment Clause of the First Amendment if: (1) it has a secular legislative purpose; (2) its principal or primary effect is neither to advance nor inhibit religion; and (3) it does not foster excessive government entanglement with religion. *Lemon v. Kurtzman, supra.* This Court has refined the analysis under the first two prongs of *Lemon*,

focusing on "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in Establishment Clause jurisprudence." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). See also *Gonzales v. North Township of Lake County, Indiana*, 4 F.3d 1412 (7th Cir. 1993).

1. The Exemption Has a Secular Purpose.

The Court need look no further than R.I. Gen. Laws § 28-42-2 to divine a secular purpose. That section elucidates the motivation behind Rhode Island's entire unemployment compensation scheme, and it is this backdrop against which the exemptions must be viewed. Rojas continues to insist that various amendments to both federal and state statutory schemes altered the purpose of the statutes. She is confusing the purpose prong of *Lemon* with the second prong, that inquiring into the effect of the statute. The purpose of the legislation is the purpose at the time of its enactment, period. The fact that amendments may later change the way the statute is applied in no way alters the legislature's purpose in enacting the unemployment compensation scheme.

The First Circuit went so far as to find that the exemption, as currently formulated, *even after the amendments*, "still rests within the context of a variety of other exemptions, all of which share a common secular purpose." 127 F.3d at 188 (App. 10). Rojas' arguments about the lack of a specifically worded exemption for non-profit organizations more appropriately is rested, then, on the "effect" prong of *Lemon*.

Neither the District Court nor the First Circuit had any difficulty determining that the purpose of the exemption scheme was the effective administration of federal and state unemployment benefits programs. 127 F.3d at 188 (App. 10), 928 F. Supp. at 163 (App. 33). The District Court elaborated, stating that the way the exemption assisted in the administration of these programs was to exclude from coverage those workers who were not recognized as full members of the permanent and stable workforce. That court stated

> . . . the amendments reflect government's recognition of the increasing role that certain non-profit organizations have in our society as a whole and more specifically in providing members of the stable workforce. Thus, **absolutely no sectarian purpose is evinced by these statutes.** Any religious benefit that results as a consequence of this secular purpose is purely incidental. (emphasis supplied).

928 F. Supp. 163 (App. 34).

Therefore, there is no factual issue as in *Metzl*, and Rojas' argument lacks merit. In a case such as this, the Court need look only to the statute, and to the stated purposes therefore, to determine whether the enactment is constitutional.

Rojas doggedly continues to insist that because Rhode Island does not provide a broad exemption for "non-profit organizations" as such, the provisions of R.I. Gen. Laws § 28-42-8(4)(i) are therefore constitutionally impermissible. She ignores the provisions of R.I. Gen. Laws § 28-42-8(4)(iii) and (iv), which undoubtedly provide a haven for a wide array of non-profits. Further, the

remaining exemptions are all offered to groups or individuals which are clearly secular in nature. R.I. Gen. Laws § 28-42-8(1)-(3), (5)-(9); 28-42-10, 11, 14.

2. The Exemption Does Not Have A Principal Or Primary Effect That Either Advances Or Inhibits Religion.

Although Rojas' argument focused on the "purpose" prong of *Lemon*, both courts below went further, and upheld the statutory exemptions under all three prongs of that test. Under the second requirement of *Lemon*, the statute must have a "principal or primary effect . . . that neither advances nor inhibits religion." 403 U.S. at 612. The First Circuit correctly found that, although religious institutions as a whole benefitted from the tax exemptions, an incidental benefit to religion does not render invalid a statutory scheme with a valid secular purpose. That Court found that "the primary practical effect of the exemptions for religious institutions is to exclude former employees of such institutions from participating in the Rhode Island unemployment system." 127 F.3d at 189 (App. 12-13). In no way can this effect be construed as "advancing" or "favoring" religion. Thus, the exemptions stand up to this portion of the *Lemon* test.

3. The Exemption Does Not Create Unconstitutional Entanglement Between Church And State.

Rojas has never argued that excessive entanglement between church and state resulted from the exemptions. Indeed, the First Circuit merely adopted the District

Court's findings in this regard. The latter found that the exemption, rather than leading to an impermissible degree of entanglement, *Walz*, 397 U.S. at 664, lead to the exact opposite result. "Rather than promoting entanglement with religion the statutes foster the separation of church and state that the First Amendment requires." 928 F. Supp. at 165 (App. 36). The application of the exemptions removes State interference and oversight into the day-to-day operation of religious organizations that might run afoul of the Free Exercise clause. Therefore, the third component of the *Lemon* test is satisfied, and the exemption survives.

III. CONCLUSION

The Petitioner approaches this Court, seeking drastic and far-reaching relief: invalidation of an unemployment taxation and compensation provision found in both the federal and state schemes on Establishment Clause grounds. There is no split in the Circuits begging for this Court's resolution. Further, contrary to her arguments, it is Rojas who bears the burden of proving that the exemptions are unconstitutional, and that burden is heavy. Rojas submitted no empirical evidence in the Court below to support her claims of unconstitutionality. Since the law weighs in favor of the exemptions, and since they clearly do not violate any constitutional prohibition, they should be upheld.

Respectfully submitted,

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Department of Labor and
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Petitioner,

vs.

LAWRENCE FITCH, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE SALVATION ARMY

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THE SALVATION ARMY'S STATEMENT OF THE QUESTION PRESENTED

Respondent, The Salvation Army, respectfully submits that the three questions presented by the Petitioner, Guadalupe Rojas ("Ms. Rojas"), are simply variations of the one issue in this case:

> Does the denial of unemployment benefits to a former employee of The Salvation Army on the ground that The Salvation Army as a church is exempt from unemployment contributions under the Federal Unemployment Tax Act and Rhode Island's Employment Security Act violate the Establishment Clause of the First Amendment?

STATEMENT PURSUANT TO RULE 29.6

The Salvation Army is a not-for-profit corporation organized without stock. There is no parent entity to The Salvation Army, and no entity is subsidiary to it.

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STATEMENT OF THE CASE

This case arises from the denial of unemployment benefits to Ms. Rojas by the Rhode Island Department of Employment and Training ("DET") on the grounds that her former employer, The Salvation Army, had been granted an exemption as a "church" from contributing a percentage of its payroll to the Rhode Island unemployment compensation tax fund pursuant to Section 3309(b) of the Federal Unemployment Tax Act (26 U.S.C. §§ 3301-3311) ("FUTA") and the Rhode Island Employment Security Act codified at Section 28-42-8(1)-(14) of the Rhode Island General Laws ("R.I.G.L."). These exemptions, applicable to a variety of institutions and individuals, not just to churches, serve a valid secular purpose in facilitating the administration of the federal-state unemployment insurance program, do not have the purpose or effect of advancing or inhibiting religion and avoid unnecessary entanglement by government in the activities of religions. The First Circuit's decision upholding the constitutionality of the exemptions falls squarely within this Court's Establishment Clause precedents including the decision last term in *Agostini v. Felton*, __ U.S. __, 117 S. Ct. 1997 (1997).

A. Factual Background

1. *The Salvation Army*

The Salvation Army was founded in 1865 as an international religious and charitable movement organized and operated on a quasi-military basis. The Salvation Army is a Christian church, with a recognized creed and form of worship, a definitive ecclesiastical government, a formal doctrine and code of discipline, a distinct religious history, a membership not associated with any other church or denomination, and ministers selected after completion of prescribed courses of study

who minister to those who come to The Salvation Army in search of spiritual and physical help. The Salvation Army has its own literature, established places of worship, regular religious services, Sunday schools for the religious instruction for both youths and adults, and schools for preparation of its ministers.

As a necessary and fully integrated part of its religious mission, The Salvation Army conducts rehabilitation programs for the spiritually disassociated members of society. It is a fundamental tenet of The Salvation Army that, before a person can truly receive and accept spiritual guidance, the physical needs of the person must be ministered to. For this purpose, The Salvation Army maintains shelters for the homeless, rehabilitation programs for substance abusers, soup kitchens, day care and camps for children, as well as a host of other charitable services, all aimed at restoring those in need to a sense of personal worth and dignity. The activities of The Salvation Army in Rhode Island include all of these services, an inseparable part of the mission and organization of The Salvation Army.

Both the federal government and the government of the State of Rhode Island have determined that The Salvation Army is a church. By determination dated October 10, 1955, the Internal Revenue Service ("I.R.S.") of the United States Treasury Department determined that The Salvation Army constitutes a church, or a convention or association of churches for purposes of the Internal Revenue Code ("I.R.C."). Based on the I.R.S. determination, in 1987 the State of Rhode Island determined that The Salvation Army was a church and therefore an employer entitled to the exemption provided in R.I.G.L. Section 28-42-8.

2. *The Applicable Statutes*

The Rhode Island Employment Security Act is part of a cooperative federal-state program administered under FUTA.[1] FUTA imposes a federal excise tax on covered employers for unemployment compensation, subject to a credit of up to 90% of the federal tax for contributions made to a state unemployment fund which meets federal certification requirements. FUTA § 3302(a)(3), (c)(1).

FUTA permits states to exclude from covered employment services performed, *inter alia*, in the employ of a church or convention or association of churches. (App. 43-44).[2] In addition to the exemption for services in the employ of a church or a convention of churches, FUTA § 3309(b) permits exemption for services performed in the employ of certain governmental entities (§ 3309(b)(3)), rehabilitation facilities (§ 3309(b)(4)), work-relief or work-training programs (§ 3309(b)(5)) and penal institutions employing inmates (§ 3309(b)(6)). (App. 43-45). Contrary to Ms. Rojas' assertion, and as can clearly be seen in the exemptions enumerated in § 3309(b)(3)-(6), Congress in the 1970 amendment did not eliminate exemptions for all secular non-profits. This repeated charge by Ms. Rojas is clearly wrong.

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1. FUTA was originally enacted as part of the Social Security Act of 1935, 49 Stat. 639.

2. 26 U.S.C. § 3306(c)(8) excludes from the definition of "employment", "service performed in the employ of a religious, charitable, educational, or other organization" which is exempt from federal income tax under § 501(c)(3). However, states are required to extend coverage to certain of these services subject to the exclusions found in FUTA § 3309(b). (App. 43). References to "App." indicate the Appendix attached to the Petition for Writ of Certiorari.

The exemption of churches or conventions or associations of churches provided under the Rhode Island Employment Security Act exactly mirrors the language of the permissible exclusion provided under FUTA § 3309(b). In addition, as with the range of exemptions provided in FUTA, R.I.G.L. § 28-42-8 provides for exemption of other employers including rehabilitation facilities, work-relief or work-training programs, hospitals employing patients, employers of inmates of a custodial or penal institution, federal government employers, etc. (App. 46-49).

3. *Ms. Rojas and Her Claims*

Ms. Rojas was initially employed by The Salvation Army from 1988 to 1990, when she left to work for another charitable organization. Ms. Rojas was employed again by The Salvation Army from 1991 until her position was terminated. Her last day of employment was March 18, 1994. On April 13, 1994, Ms. Rojas filed with the DET for unemployment benefits, but was determined to be ineligible pursuant to R.I.G.L. Sections 28-44-11 and 28-42-8(4).

Ms. Rojas appealed that determination. A hearing was held before a DET Referee on May 12, 1994, who found that Section 28-42-8(4) does not violate the United States Constitution or the Rhode Island Constitution. The DET Board of Review "approved and confirmed" the decision of the Referee by decision dated August 16, 1994.

On or about September 9, 1994, Ms. Rojas initiated an action in the United States District Court for the District of Rhode Island, without naming The Salvation Army as a party defendant. In her federal complaint, Ms. Rojas sought, *inter alia*, a declaratory judgment that R.I.G.L. Section 28-42-8(4)

and FUTA § 3309(b) violate the United States Constitution and Article I, Section 3 of the Rhode Island Constitution. Ms. Rojas also filed a parallel state court action in Rhode Island which, by agreement, was deferred pending resolution of her federal court action.

In December 1994, The Salvation Army of Rhode Island, Inc. moved without objection to intervene in Ms. Rojas' federal court action on the grounds that it was a party to the DET proceedings and that its exemption under R.I.G.L. Section 28-42-8(4) was at issue in the proceeding.[3] The Salvation Army's motion was granted. In March 1995, Ms. Rojas moved to amend her complaint to join the Secretary of the United States Department of Labor on the grounds that Federal law (FUTA § 3309(b)), is inextricably "connected" with the Rhode Island State law at issue. That motion was also granted.

As there was no dispute as to the fact of Ms. Rojas' employment and termination by The Salvation Army and because the success or failure of Ms. Rojas' claims would depend on the District Court's determination of the constitutionality of the challenged statutory provisions, the District Court directed the parties to brief the contested constitutional issues.[4] Pursuant to the direction of the District Court, each defendant submitted memoranda in support of the dismissal of Ms. Rojas' claims. Following oral argument, the District Court entered judgment

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3. Although the original Defendant Intervenor was The Salvation Army of Rhode Island, Inc., because The Salvation Army, a New York corporation qualified to conduct its affairs in Rhode Island, was in fact the employer of Ms. Rojas, it is the proper party and was substituted as Defendant Intervenor.

4. The parties, however, *did not* agree to a purported "Joint Stipulation of Facts," as is asserted by Ms. Rojas. (Petition for Certiorari at p. 4).

for the defendants on June 10, 1996 upholding the constitutionality of the FUTA and R.I.G.L. exemptions.[5] On June 24, 1996, Ms. Rojas moved pursuant to Fed. R. Civ. P. 52(b) and Fed. R. Civ. P. 59 to alter, amend or vacate the judgment on the ground that the District Court's finding of a secular purpose with respect to the FUTA exemption was not supported by the record. The District Court denied Ms. Rojas' motion to amend the judgment.

Following the District Court's denial of her motion to alter, amend or vacate the judgment, Ms. Rojas appealed to the First Circuit. After post-argument submissions discussing this Court's decision in *Agostini v. Felton*, __ U.S. __, 117 S. Ct. 1997 (1997), and *City of Boerne v. Flores*, __ U.S. __, 117 S. Ct. 2157 (1997), the First Circuit issued its decision on October 9, 1997 affirming the District Court and concluding that the FUTA and R.I.G.L. exemptions do not violate the Establishment Clause. Subsequent to the decision of her motion for rehearing, Ms. Rojas filed her petition before this Court.

REASONS FOR DENYING THE WRIT

The only basis for Ms. Rojas' request for certiorari is her contention that the First Circuit's decision upholding the constitutionality of the FUTA and R.I.G.L. exemptions is contrary to prior Establishment Clause precedents of this Court

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5. The District Court also rejected arguments that it should (i) dismiss Ms. Rojas' claims pursuant to the Tax Injunction Act; (ii) abstain from exercising its jurisdiction over this case; and (iii) dismiss Ms. Rojas' claims against the Secretary of Labor for lack of standing. *Rojas v. Fitch*, 928 F. Supp. 155, 159, 161, 162 (D.R.I. 1996), *aff'd*, 127 F.3d 184 (1st Cir. 1997) (App. 20, 26, 28). The First Circuit did not reach these points in its decision upholding the constitutionality of the FUTA and R.I.G.L. exemptions. *Rojas v. Fitch*, 127 F.3d 184, 187 (1st Cir. 1997) (App. 6).

including last term's *Agostini* decision. This argument fails because the exemptions in question satisfy fully the test developed by this Court for review of legislation challenged on Establishment Clause grounds.

The FUTA and R.I.G.L. exemptions are consistent with this Court's Establishment Clause analysis under the long-standing doctrines of "reasonable accommodation" and "benevolent neutrality" toward religion found in the many exemptions afforded religious institutions by federal and state governments. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987); *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 673 (1970). Similarly, the statutory exemptions, while incidentally benefiting religious institutions, have an "overall secular purpose" available to religious and non-religious institutions consistent with this Court's precedents. *See, e.g., Walz*, 397 U.S. at 672-73; *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989).

I.

THE FIRST CIRCUIT DID NOT MISREAD OR MISAPPLY AGOSTINI.

Agostini did not abandon but rather reaffirmed the criteria in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) for challenging legislation on Establishment Clause grounds. *See* __ U.S. at __, 117 S. Ct. at 2010, 2015. What did change under *Agostini*, as recognized and applied by the First Circuit, were the criteria used to assess whether aid to religion has an impermissible effect. 127 F.3d at 187-88 (App. 8-9) citing *Agostini*, __ U.S. __, 117 S. Ct. at 2010-13. Specifically, this Court acknowledged that its more recent Establishment Clause jurisprudence

> abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion,

117 S. Ct. at 2010; and, "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 2011. The First Circuit did not "ignore the essential teaching" or "sidestep" *Agostini*; it applied the *Lemon* and *Agostini* criteria to the FUTA and R.I.G.L. exemptions and found no violation of the Establishment Clause (*see* discussion, *infra*).

Ms. Rojas' criticism of the First Circuit's reading of *Agostini* rests on the false predicate that the FUTA and R.I.G.L. exemptions

> expressly uses religion as the touchstone and divides the universe of all non-profit employers into two categories — the religious (eligible for the government benefit) and the secular (not eligible).

(Petition for Certiorari at p. 9). This statement ignores the statutory language of the exemptions in question which provide on their face that the benefits of the exemptions apply to both religious and non-religious organizations and individuals: *e.g.*, various government employees, employees in rehabilitation facilities, work-relief or work training programs, certain types of youth services programs, and penal institutions employing inmates (*see* App. 43-45; App. 47-48). The First Circuit correctly found that all of the exemptions share a common secular purpose and provide benefits in a neutral manner complying with the *Lemon* and *Agostini* criteria. 127 F.3d at 187-88 (App. 8-9). Ms. Rojas offers no evidence to the contrary.

II.

THE FUTA AND R.I.G.L. EXEMPTIONS DO NOT ADVANCE OR INHIBIT RELIGION AND ARE CONSISTENT WITH THIS COURT'S ESTABLISHMENT CLAUSE PRECEDENTS.

A. Ms. Rojas Has the Burden of Overcoming the Presumption of Constitutionality Applicable to the FUTA and R.I.G.L. Exemptions

As the party challenging the FUTA and R.I.G.L. exemptions, Ms. Rojas has the burden of overcoming the statutes' presumption of constitutionality. *See Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994) citing *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987); *Gillette v. United States*, 401 U.S. 437, 451-52 (1971). Ms. Rojas can only shift that burden by demonstrating by direct evidence that a religious purpose was a substantial or motivating factor in the enactment of the legislation in question. *Church of Scientology*, 2 F.3d at 1530. Her contention that the FUTA and R.I.G.L. exemptions on their face favor "religious non-profits over similarly situated secular non-profits" (Petition for Certiorari at p. 19), has no merit since the exemptions, on their face, apply to an array of individuals and institutions, not just religious institutions or employees.

Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) does not alter Ms. Rojas' burden. The statute in *Metzl* on its face favored one religion, Christianity, over others by making Good Friday a school holiday. The FUTA and R.I.G.L. exemptions do not favor one religion or all religions on their face. Plaintiff in *Metzl* offered clear evidence that the purpose of the statute was to encourage Christian religious observances. Ms. Rojas, as noted

by the First Circuit, offered no evidence (except her bald assertions), that the FUTA and R.I.G.L. exemptions were intended to benefit religious groups to the exclusion of non-religious groups. 127 F.3d at 188-89 (App. 11-12). Contrary to Ms. Rojas' assertions (Petition for Certiorari at pp. 20-21), it is not the "job" of the state and federal government (or of The Salvation Army) to present a "defense" of a facial distinction in the FUTA and R.I.G.L. exemptions between religious non-profits and secular non-profits because the statutory exemptions, on their face, do not make such a distinction.

B. The FUTA and R.I.G.L. Exemptions Have a Valid Secular Purpose Which Does Not Benefit Religion Exclusively

Congress did not enact FUTA and Rhode Island its Employment Security Act for the purpose of promoting the religious beliefs and teachings of The Salvation Army or of any other religion. On their face, the statutes were enacted with the secular purpose of providing compensation to unemployed members of the work force. Similarly, the 1970 and 1976 amendments to the FUTA and R.I.G.L. exemptions were not passed to promote religion but rather to extend unemployment coverage to previously exempt employees (a clearly secular purpose), while retaining exemptions for a range of exempt employers, not exclusively religious groups. These exemptions, like the property tax exemptions in *Walz*, constitute reasonable and balanced attempts to guard against government hostility toward religion, just as the exclusive exemptions to religious organizations under Title VII allowed in *Amos* showed a legislative purpose to alleviate government interference with religious organizations' efforts to carryout their missions.

The First Circuit, as did the District Court, viewed the exemptions in the overall context of the federal and Rhode

Island unemployment benefits programs and concluded that the exemptions served the valid secular purpose of facilitating the administration of the unemployment compensation system. 127 F.3d at 188 (App. 9), 928 F. Supp. at 164 (App. 33-34). This secular purpose conclusion is in harmony with the purposes of both FUTA and R.I.G.L., the breadth of the exemptions found under both statutes, the lack of evidence of any overriding sectarian purpose, and the validity of similar exemptions such as the direct property tax exemption in *Walz*, the unemployment exemptions found constitutional by the New York Court of Appeals in *In re Claim of Klein*, 78 N.Y.2d 662, 668-69, 585 N.E.2d 809, 813 (1991), *cert. denied*, 504 U.S. 912 (1992); and similar exemptions under the District of Columbia's unemployment compensation plan upheld in *Konecny v. District of Columbia Department of Employment Service*, 447 A.2d 31, 35 (D.C. 1982).

Equally as important, the FUTA and R.I.G.L. exemptions foster an overall secular purpose by limiting the need of the state to entangle itself in religion through review of employment decisions grounded on religious rationales, a factor recognized by the First Circuit, 127 F.3d at 188 (App. 10), but ignored by Ms. Rojas.

C. The First Circuit's Decision Is Consistent With *Texas Monthly* and Other Cases Relied Upon by Ms. Rojas

The First Circuit did not "disregard" *Texas Monthly*. Instead, the First Circuit rejected Ms. Rojas' reading of *Texas Monthly* to require that the FUTA and R.I.G.L. exemptions (incidentally benefiting religion), "*must* grant a like benefit to every group that could also conceivably fall within the secular rationale for the exemption provision." 127 F.3d at 189 (App. 11) (emphasis in original). Ms. Rojas now contends that her challenge to the FUTA and R.I.G.L. exemptions was not based

on the "underinclusiveness" argument rejected by the First Circuit but is based on her contention that § 3309(b) of FUTA "preserves the non-profit charitable exemption expressly for one type of employee and one type only — the religious employee." (Petition for Certiorari at p. 10). This argument is flat out wrong. It not only ignores the secular purpose of the FUTA and R.I.G.L. statutes and exemptions (discussed, *supra*) but disregards the wording and plain meaning of the amended FUTA and R.I.G.L. exemptions which are *not* limited to religious organizations.

Section 3309(b) of FUTA exempts from mandatory state unemployment coverage services performed by employees of churches, ministers, state and local elected officials, legislatures, members of the judiciary, other specified government employees, employees working in certain rehabilitation facilities, participants in work-relief or work-training programs, inmates of custodial or penal institutions, and certain employees of small not-for-profit corporations. *See* App. 43-45. The R.I.G.L. exemptions parallel the FUTA exemptions and also extend to services performed by patients in hospitals, occasional, irregular or incidental services, golf caddies, commission-only real estate and insurance salesmen, students in co-op work programs, and workers on boats. *See generally* App. 46-50.

This is not a case like *Texas Monthly* where the exclusively religious exemption to the Texas sales and use tax granted to religious writings was effectively a state sponsorship of religious beliefs with no justifiable secular objective and no like benefits available for non religious groups. 489 U.S. at 15. The FUTA and R.I.G.L. exemptions do not promote the religious beliefs of The Salvation Army or of any other religion and are not intended to and do not apply exclusively to religious organizations as is readily apparent from the range of other organizations and individuals who are granted exemptions.

Ms. Rojas' reliance on *dicta* in *United States v. Lee*, 455 U.S. 252 (1982) (Petition for Certiorari at 17), does not support her Establishment Clause challenge to the FUTA and R.I.G.L. exemptions. *Lee* involved a challenge by an Amish employer on Free Exercise grounds to the imposition of social security taxes. While payment of the tax conflicted with the religious beliefs of the Amish employer, this Court upheld the constitutionality of the tax, finding an overriding public interest in maintaining the stability of the Social Security system. 455 U.S. at 260. The Court also upheld as a reasonable accommodation the exemption granted to self-employed Amish, and left it to Congress to expand that exemption. *Id.* at 260-61. In fact, Congress later expanded the exemption to include situations where both the employer and employee were members of a recognized religion which opposed the Social Security system. *See* 28 U.S.C. § 3127. There was no Establishment Clause analysis or holding in *Lee*. Indeed, a subsequent Establishment Clause challenge to the Social Security exemptions was rejected in *Droz v. Commissioner of Internal Revenue*, 48 F.3d 1120, 1124-25 (9th Cir. 1995), *cert. denied*, __U.S.__, 116 S. Ct. 698 (1996).

Finally, Ms. Rojas' reliance on *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990) (Petition for Certiorari at pp. 16-17), is equally misplaced. *Swaggart* involved a First Amendment challenge by a religious organization to the California sales and use tax on the sale of their publications. This Court rejected the Free Exercise challenge because the collection of the generally applicable tax did not impose a constitutionally significant burden on Swaggart's religious beliefs. 493 U.S. at 392.

The Establishment Clause analysis in *Swaggart* focused on the "entanglement" prong of the *Lemon* test. The Court found that the administrative and record keeping burdens associated

with payment of the sales and use tax did not rise to a constitutionally significant level. There was no "excessive entanglement," particularly since the collection and payment of the tax did not require the State to inquire into Swaggart's religious motivation for selling or purchasing religious items or into the religious content of those items since "the materials are subject to the tax regardless of content or motive." 493 U.S. at 396.

The FUTA and R.I.G.L. exemptions do not lead to "excessive entanglement." The exemptions are focused on the status of the employer and make no reference to the nature of the services performed by church employees. *See, e.g., St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 784 (1981). Consequently, as in *Swaggart*, there is no need for any government scrutiny into the nature of the employment relationship or the secular/religious nature of the services provided which might lead to "excessive entanglement." *See, e.g., Konecny, supra.* Indeed, as the District Court and First Circuit found, the FUTA and R.I.G.L. exemptions decrease the entanglement of government with religious affairs. 127 F.3d at 188 (App. 10), 928 F. Supp. at 164 (App. 33-34).

III.

THE EXEMPTIONS ARE REQUIRED TO PRESERVE THE SALVATION ARMY'S FIRST AMENDMENT FREE EXERCISE RIGHTS.

The FUTA and R.I.G.L. exemptions for religious organizations avoid "excessive government entanglement" with religion proscribed under the Establishment Clause and, equally as important, serve to prevent government interference with The Salvation Army's free exercise of its religious beliefs. As with the exemptions to § 702 of the Civil Rights Act of 1964 found

constitutional in *Amos, supra,* 483 U.S. at 339, the FUTA and R.I.G.L. exemptions provide a reasonable accommodation of religion not an endorsement of religion.

Under I.R.C. § 3304(a)(10) and R.I.G.L. § 28-44-18, unemployment compensation benefits will be denied where the discharge of an employee is for "proved misconduct connected with [the employee's] work." In the case of a church, such as The Salvation Army, the misconduct that would prompt the discharge could be non-compliance with the church's religious principles and practices. This is a "uniquely subjective determination" as applied to a religious organization which may differ significantly from the determination to discharge an employee made by a non-religious organization, thus leading to unnecessary entanglement by the government with a church's religious mission. *See, e.g., Konecny, supra,* 447 A.2d at 37, n.5; *Grace Lutheran Church v. North Dakota Employment Bureau,* 294 N.W.2d 767, 773-74 (N.D. 1980).

The Salvation Army's soup kitchens, rehabilitation centers, counseling centers, alcohol recovery programs and related activities are not just charitable works but are a central part of The Salvation Army's religious mission. The imposition of an unemployment tax on The Salvation Army for its social workers would interfere in this essential religious mission and would create a significant restraint upon The Salvation Army's exercise of its religious beliefs, much like the burdens on religion found unconstitutional in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Follett v. McCormick*, 321 U.S. 573 (1944), but unlike the burden of having a third party pay a sales tax on the purchase and sale of religious publications in *Texas Monthly*.

The exemptions in FUTA § 3309(b) and R.I.G.L. § 28-42-8(4) preserve The Salvation Army's ability to make religiously based employment decisions free from government

intrusion. If the Rhode Island DET were to require The Salvation Army or any other religious organization to provide unemployment insurance benefits to employees discharged for religious reasons, the rights of that church or religious organization under the Free Exercise Clause would be violated. If the DET were to accept discharge for religious reasons as "misconduct" which would justify denial of unemployment insurance benefits, the DET and the courts would be confronted with making a determination as to whether the discharge was truly for religious reasons, necessarily becoming entangled in the religious principles and policies of The Salvation Army and other religious organizations. Such entanglement would run afoul of the Establishment Clause. Consequently, the inclusion of the FUTA and R.I.G.L. exemptions is constitutional and the elimination of these exemptions would clearly be unconstitutional.

CONCLUSION

The First Circuit's decision is in harmony with this Court's Establishment Clause precedents. Ms. Rojas has failed to show otherwise and has offered no compelling reason why certiorari should be granted. The Salvation Army respectfully submits that this Court should reject Ms. Rojas' petition for a writ of certiorari.

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No. 97-1550

In the Supreme Court of the United States

OCTOBER TERM, 1997

GUADALUPE ROJAS, PETITIONER

v.

LAWRENCE FITCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Federal Unemployment Tax Act, 26 U.S.C. 3301 *et seq.*, authorizes participating States to exempt a number of employee services from unemployment compensation coverage. 26 U.S.C. 3309(b) and (c). Among those services eligible for exemption are (i) employees of "a church or convention or association of churches," (ii) employees of "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches," and (iii) the services of "a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order." 26 U.S.C. 3309(b)(1) and (2). The question presented in this case is:

Whether the Federal Unemployment Tax Act's inclusion of employment by religious organizations among the eligible exemptions violates the Establishment Clause.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 127 F.3d 184. The district court's opinion (Pet. App. 14-40) is reported at 928 F. Supp. 155.

JURISDICTION

The court of appeals entered its judgment on October 9, 1997. A petition for rehearing was denied on December 18, 1997. Pet. App. 41-42. The petition for a writ of certiorari was filed on March 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301 *et seq.*, establishes a cooperative federal-state program of benefits for unemployed workers. See *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 775 (1981). FUTA imposes an excise tax on employers who pay wages to employees in covered employment. 26 U.S.C. 3301, 3306(c).[1] FUTA also grants covered employers a credit of approximately 90% of the federal tax for their payment of state unemployment taxes if the State's unemployment compensation law meets established federal criteria. 26 U.S.C. 3302(a)-(d)(1), 3304, 3309(a).[2] Participation in the FUTA program is voluntary. Currently, all fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands are participating.

One of the requirements for States to participate in the FUTA program is that the State's unemployment compensation program cover certain types of employment. See 26 U.S.C. 3304(a)(6), 3309(a). Prior to 1970, States could exclude from coverage all of the nonprofit organizations exempted from the federal excise tax by 26 U.S.C. 3306(c)(8). The Employment Se-

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[1] FUTA excepts approximately twenty classes of employment from the federal excise tax, including "service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a)." 26 U.S.C. 3306(c)(8).

[2] Although 26 U.S.C. 3302(c)(1) authorizes a federal tax credit of 90%, Section 3302(d)(1) deems the tax rate for computation of that credit to be 6%, when the rate currently charged is 6.2%. 26 U.S.C. 3301 (authorizing 6.2% rate for calendar years 1988-1998). Consequently, the current credit ceiling is about 87%.

curity Amendments of 1970, Pub. L. No. 91-373, § 104(a)-(b)(1), 84 Stat. 697, changed the law by mandating coverage by participating States of all nonprofit organizations except those specified as eligible for exemption under 26 U.S.C. 3309(b) and (c). See *St. Martin*, 451 U.S. at 776 & n.6. In 1976, Congress amended the list of available exemptions by removing the exemption for some elementary and secondary schools and replacing it with an exemption for certain government employees. See Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115(b)(1), 90 Stat. 2670; *St. Martin*, 451 U.S. at 777.

At the time of petitioner's claim for benefits, FUTA permitted participating States to exclude seven categories of employees from coverage under their state plans:

(1) employees of churches and affiliated religious organizations;

(2) ministers and members of religious orders;

(3) designated state and local government employees;

(4) employees with impaired physical or mental capabilities who are unable to enter the labor market and who are working in facilities that provide rehabilitation or remunerative work;

(5) participants in federal, state, local, and federally assisted work-relief or work-training programs;

(6) inmates of custodial or penal institutions; and

(7) employees in nonprofit organizations that do not employ at least four employees for at least twenty days a year.

26 U.S.C. 3309(b) and (c).[3]

b. Through the Rhode Island Employment Security Act, Rhode Island elected to exempt, *inter alia*, services performed "in the employ of: (A) A church or convention or association of churches, or (B) an organization which is * * * operated, supervised, controlled, or principally supported by a church or convention or association of churches." R.I. Gen. Laws § 28-42-8(4)(i)(A)-(B) (1995). Other employees exempted by Rhode Island include golf caddies, real estate salespersons and insurance brokers being paid solely on commission, and participants in the Americorps program. *Id.* § 28-42-8(9)-(11), (14) (1995).

2. Except for a temporary hiatus during 1990-1991, petitioner worked as a social worker for the Salvation Army in Providence, Rhode Island from 1988 to 1994. Pet. App. 2. In March 1994, financial constraints compelled the Salvation Army to terminate petitioner's employment. *Ibid.*

Petitioner subsequently applied for unemployment insurance benefits. Her application was rejected because Rhode Island had elected to exempt churches and church-operated organizations from the State's unemployment compensation program. Pet. App. 3. The denial of benefits was affirmed by the Rhode

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[3] The Balanced Budget Act of 1997 added an additional exemption for election workers making less than $1,000 in a calendar year. Pub. L. No. 105-33, § 5405, 111 Stat. 604-605. The Act also authorized States to exempt employees of elementary and secondary schools that are "operated primarily for religious purposes." § 5407, 111 Stat. 605.

Island Department of Employment and Training's administrative appeals process. *Ibid.*

3. In September 1994, petitioner filed suit against Rhode Island seeking invalidation of the State's exemption for church-affiliated entities as a violation of the Establishment Clause, the Equal Protection Clause, and the Rhode Island Constitution. Pet. App. 3-4. The Salvation Army subsequently intervened as a defendant in the action, and the plaintiff later amended her complaint to add claims against the Secretary of Labor on the ground that FUTA's authorization of religious exemptions "was inextricably connected with the Rhode Island statute in question." *Id.* at 19-20.[4]

The district court rejected the defendants' jurisdictional objections to the suit. It held that petitioner had standing to challenge FUTA because Rhode Island could not have exempted the Salvation Army and remained in compliance with FUTA if the federal statute had not authorized the religious exemption. Pet. App. 26-28. The district court also ruled that neither the Tax Injunction Act, 28 U.S.C. 1341, nor the abstention doctrine required dismissal of the suit. Pet. App. 20-26. The district court then ruled that neither FUTA nor the Rhode Island statute ran afoul of the Establishment Clause. *Id.* at 28-37.[5]

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[4] A week after she initiated her federal action, petitioner filed a similar complaint in Rhode Island state court. Pet. App. 19. That action has been stayed pending the outcome of the federal lawsuit. *Ibid.*

[5] The district court also rejected petitioner's equal protection and state constitutional claims. Pet. App. 37-40. Petitioner does not raise either of those arguments in her petition to this Court.

4. The court of appeals affirmed. The court averted the defendants' jurisdictional arguments and proceeded directly to petitioner's Establishment Clause challenge. Pet. App. 6-7. The court of appeals noted that neither the Rhode Island nor the federal religious exemptions stand alone; rather, they are grouped with a number of other, secular exemptions that all serve the common secular purpose of facilitating the government's administration of the unemployment compensation program. *Id.* at 9-10. In particular, the court noted, the religious exemption enhances program administration and protects church autonomy by obviating government review of employment decisions that might have been made, in whole or in part, on religious grounds. *Id.* at 10.

ARGUMENT

Because the court of appeals' decision is correct and consistent with the decisions of this Court and of other courts of appeals, the petition for a writ of certiorari should be denied.

1. Petitioner does not dispute that the court of appeals applied the correct legal test to determine whether FUTA and the Rhode Island unemployment compensation program violate the Establishment Clause. See Pet. 23. The court of appeals applied the three factors identified in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), and adhered to this Court's clarification of the factors' operation last term in *Agostini* v. *Felton*, 117 S. Ct. 1997, 2010, 2015-2016 (1997). See Pet. App. 8-12. Indeed, the decisions of this Court that petitioner relies upon in arguing that the court of appeals erred—*Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989) (plurality opinion); *California* v. *Grace*

Brethren Church, 457 U.S. 393 (1982); and *Agostini*, *supra* (Pet. 23; see also Pet. 11-18)—were all discussed and applied by the court of appeals. See Pet. App. 7-12.[6] Petitioner disagrees only with the outcome of the court of appeals' application of the correct legal test to the specific circumstances of this case. See, *e.g.*, Pet. 8-9. That disagreement, however, presents no issue of broad importance warranting an exercise of this Court's discretionary certiorari jurisdiction. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

2. The decision of the court of appeals is, in any event, correct and consistent with this Court's Establishment Clause precedents. The court of appeals correctly concluded (Pet. App. 9-13) that FUTA's exemption for religious organizations has a secular purpose and a primary effect that neither inhibits nor advances religion. See *Agostini*, 117 S. Ct. at 2010, 2015-2016; *Lemon*, 403 U.S. at 612-613.

a. FUTA's authorization of exemptions for employees of religious institutions has a secular purpose. It is but one of seven exemptions permitted for non-profit organizations—five of which are unrelated to religion. 26 U.S.C. 3309(b)-(c). All of those exemptions share the common secular purpose of facilitating the government's administration of the

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[6] Petitioner's reliance on *Grace Brethren* is particularly puzzling, because the only issue decided in that case was that the Tax Injunction Act barred the schools' action, precluding the Court from addressing the Free Exercise and Establishment Clause challenges to FUTA and its state counterpart. 457 U.S. at 407-419.

unemployment insurance system by excluding employees whose work would create inordinate administrative or accounting difficulties.[7] For example, FUTA permits the exclusion of nonprofit organizations that do not employ at least four persons for twenty days a year, because the additional tax and bookkeeping costs would not be justified. Persons working solely on commission may be excluded because of the accounting difficulties entailed in tracking such wages. See 26 U.S.C. 3306(c) and (i); R.I. Gen. Laws § 28-42-8 (Supp. 1997). The exclusion of employees of religious organizations likewise promotes administrative manageability by eliminating the need for government employees to review employment decisions that could be made on the basis of religious rationales. See Pet. App. 10; see also 26 U.S.C. 3304(a)(10); R.I. Gen. Laws §§ 28-44-17, 28-44-18 (1995) (limiting benefits if employee is "discharged for proved misconduct connected with his or her work," or if employee "leaves work voluntarily without good cause"). The ability to exclude religious organizations allows States to avoid judging whether departures, discharges, or firings based in whole or in part on religious considerations either constitute "good cause" or reflect employee "misconduct."[8]

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[7] Rhode Island law also treats religious employees as just one of fourteen categories of employees the inclusion of which would create administrative burdens for the program. R.I. Gen. Laws § 28-42-8 (Supp. 1997).

[8] Petitioner's complaint (Pet. 22) that FUTA impermissibly distinguishes between religious and secular private schools as a means of advancing religion is thus misplaced. The two are treated differently because only the former presents the administrative difficulty of reviewing religious employment decisions. Likewise, confining FUTA to criteria that focus

Thus, while commission-based insurance brokers, rehabilitation programs, and religious employers all present different types of administrative burdens, their eligibility for exemption serves the common secular purpose of facilitating the smooth operation and administration of unemployment compensation programs. See *Texas Monthly*, 489 U.S. at 14 (subsidy permissible insofar as it "is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end") (footnote omitted). In this regard, FUTA is analogous to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which excludes certain employers from its coverage, 42 U.S.C. 2000e(b), 2000e-1, and, in addition, exempts religious organizations from Title VII's prohibition on religious discrimination in employment, 42 U.S.C. 2000e-1(a). In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987), this Court held, without dissent, that the statutory amendment creating that religious exemption comported with the Establishment Clause. Contrary to petitioner's contention that governmental exemptions must be formulated without reference to religion (Pet. 18, 22), *Amos* held that *Lemon*'s secular purpose requirement does not mean that "the law's purpose must be unrelated to religion." *Amos*, 483 U.S. at 335; see also *Texas Monthly*, 489 U.S. at 10. Rather, *Amos* held that "it is a permissible legislative pur-

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on the size of the employer, irregular work patterns, or the difficulty of accounting for wages, as petitioner proposes (Pet. 18), would do nothing to address FUTA's concern over having government employees review and evaluate religiously based discharges.

pose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Ibid.* FUTA's religious exemption, like Title VII's, "minimize[s] governmental interference with the [employment] decision-making process in religions." *Id.* at 336. Here, as in *Amos*, "this purpose does not violate the Establishment Clause." *Ibid.*[9]

b. The FUTA exemption likewise does not have the "principal or primary effect," 403 U.S. at 612, of advancing religion. As this Court recognized in *Amos*, "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 483 U.S. at 337. The availability of an exemption for religious employers under FUTA in no way advances religion. It promotes the interests of government in program administrability and avoiding entanglement in religious doctrine. See *Agostini*, 117 S. Ct. at 2015 (entanglement concerns are an appropriate component of the effects inquiry). Indeed, a State's adoption of the

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[9] Even assuming, contrary to our argument above, that Congress had some religious purpose in permitting the exemption of religious organizations, it is important to remember that "[a] religious purpose alone is not enough to invalidate an act of a * * * legislature." *Edwards* v. *Aguillard*, 482 U.S. 578, 599 (1987) (Powell, J., concurring) (citing additional cases). "The religious purpose must predominate." *Ibid.*; see also *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985). The predominance of secular exemptions in FUTA forecloses any argument that Congress's primary purpose in authorizing the exemptions was to advance religion.

exemption may well make it harder for religious entities to attract quality employees because no unemployment benefits will be available to cushion a discharge. Pet. App. 35 n.5. Furthermore, petitioner does not contend that the exclusion provides religious employers an unfair economic advantage in the commercial, profit-making arena. Cf. *Amos*, 483 U.S. at 349 (O'Connor, J., concurring).

Petitioner makes no argument that the exemption promotes religious indoctrination. See *Agostini*, 117 S. Ct. at 2016. Nor has petitioner presented any evidence that religious organizations have a greater ability now to propagate religious doctrine than they did when FUTA or any of its amendments was enacted. *Amos*, 483 U.S. at 337. Rather, FUTA's religious exemption simply ensures that neither the unemployment compensation programs nor the religious entities are made worse off by the coverage of such entities. See *Walz*, 397 U.S. at 675.

Finally, this case concerns an exemption, not an affirmative government benefit. A statute that classifies benefit recipients on the basis of religion may receive greater Establishment Clause scrutiny than an exemption of religious practitioners that accommodates a secular governmental purpose and protects the autonomy of the religious organization. Compare *Agostini*, 117 S. Ct. at 2014, with *Board of Education of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 705-707 (1994); *id.* at 715-716 (O'Connor, J., concurring); *Amos*, 483 U.S. at 335-337; and *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); see also *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 117 S. Ct. 1590, 1605 (1997) ("[T]here is a constitutionally significant difference between subsidies and tax exemptions."); accord *Walz*, 397 U.S. at

675. Such heightened scrutiny is applied because conditioning the receipt of a benefit on the basis of religion could create an impermissible economic incentive to undertake religious activity. Exemptions, on the other hand, withhold or withdraw a governmental program from the religious sphere and thus are less likely to influence individual religious decisionmaking.

In any event, recipients of exemptions under FUTA and state programs are not defined exclusively by reference to religion: as noted, the exemptions—both secular and religious—are identified by their impact on administration of the program. Petitioner's argument (Pet. 12, 16, 18) that Congress's process of amending FUTA is suspect because it has expanded the workforce covered by FUTA while retaining the religious exemption is misplaced. The changes that have occurred in the national economy, the composition of the workforce, the role of non-profit organizations in the national economy, and in administrative technology have made it possible to expand FUTA's coverage. See Pet. App. 34. None of those developments, however, eliminates the concern about governmental review of religious employment decisions. Congress's legislative judgment in that regard "is a decision entitled to deference, not suspicion." *Amos*, 483 U.S. at 338; see also *Bowen* v. *Kendrick*, 487 U.S. 589, 607 n.11 (1988) (amendment's specific addition of religious organizations as eligible participants in program does not impermissibly advance religion when Congress had a secular purpose for including religious entities).

c. Petitioner is mistaken in arguing (Pet. 8-9, 12-17) that this Court's decisions in *Texas Monthly* and *Walz* mandate that religious exemptions be made

available to a full range of non-religious groups as well as religious organizations. First, the tax exemption at issue in *Texas Monthly* was not grounded "in some secular legislative policy that motivated similar tax breaks for nonreligious activities." 489 U.S. at 14 n.4. FUTA, like the property tax exemption in *Walz*, does authorize exemptions for a variety of secular entities that raise comparable administrability problems for unemployment compensation programs. See *Walz*, 397 U.S. at 673, 674; see also *Texas Monthly*, 489 U.S. at 14 & n.4; Pet. App. 10.

Second, the tax exemption at issue in *Texas Monthly* was confined to the particular religious activity of "promulgating the teaching of the faith" and publishing "writings sacred to a religious faith." 489 U.S. at 5. FUTA does not condition the exemption on any particular speech content or religious activity.

Third, the inquiries into religious doctrine that assessments of employment "misconduct" and "good cause" would entail were FUTA to apply are a far cry from the "routine and factual inquiries" associated with the sales and use taxes at issue in *Texas Monthly*. 489 U.S. at 21; see also *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 396 (1990) (finding it "significant[]" that the routine administrative and recordkeeping requirements of a sales and use tax "do[] not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items"); *Hernandez* v. *Commissioner*, 490 U.S. 680, 696-697 (1989) (rejecting argument under which government regulators would be required to distinguish between "secular" and "religious" benefits or services because the regulatory scheme would "be

fraught with the sort of entanglement that the Constitution forbids") (internal quotation marks and citation omitted).

Fourth, *Amos* makes clear that exemptions that "effectuate[] a more complete separation of" religious organizations and the government and that avoid "intrusive inquir[ies] into religious belief," 483 U.S. at 339, need not necessarily "come packaged with benefits to secular entities," *id.* at 338.[10]

3. The court of appeals' decision does not conflict with the ruling of any other court. To the contrary, the court's ruling is the first federal appellate decision to address whether FUTA's authorization of a religious exemption comports with the Establishment Clause.[11] We are, moreover, unaware of any other Establishment Clause challenge to FUTA's religious exemptions currently pending.

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[10] Petitioner's contention (Pet. 10, 17), relying on *United States* v. *Lee*, 455 U.S. 252 (1982), that FUTA impermissibly excludes employees of religious entities from the unemployment compensation program is incorrect. First, *Lee* was a free exercise case, not an Establishment Clause case. *Id.* at 254. Second, the Court specifically noted that some measure of accommodation of religious employers was permissible. *Id.* at 261 ("[A] tax must be uniformly applicable to all, *except as Congress provides explicitly otherwise.*") (emphasis added). Third, petitioner's argument was already rejected in *Amos*. See 483 U.S. at 338-339.

[11] In *St. Martin*, the South Dakota Supreme Court addressed the Department of Labor's determination that parochial schools were subject to unemployment compensation coverage. *In re Northwestern Lutheran Academy*, 290 N.W.2d 845 (1980), rev'd, 451 U.S. 772 (1981). In *Grace Brethren*, a federal district court addressed the constitutionality of applying the unemployment tax scheme to certain religious schools. See 457 U.S. at 399-403.

Petitioner is mistaken in asserting (Pet. 19-20) that the court of appeals' decision conflicts with the Seventh Circuit's opinion in *Metzl* v. *Leininger*, 57 F.3d 618 (1995). In *Metzl*, the Seventh Circuit held that a statute making Good Friday a public school holiday violated the Establishment Clause because there was no secular purpose justifying the legislation. *Id.* at 621-623. In the course of its decision, the court held that the State bore the burden of proving the existence of a secular purpose justifying the statute. *Id.* at 622.

In the present case, the court of appeals observed that "[petitioner] is unable to direct our attention to, nor can we find, any indications in the legislative history of [the FUTA amendments] that suggest an impermissible purpose of advancing religion in general or any particular religion." Pet. App. 9. Petitioner claims that this aspect of the court of appeals' decision conflicts with *Metzl*'s assignment to the State of the burden of production of evidence of a secular purpose. Pet. 19. Petitioner's contention, however, overlooks two significant differences between *Metzl* and the present case.

First, *Metzl* involved a statute that, on its face and in its public interpretation by the governor, embodied an explicit sectarian preference. See *Metzl*, 57 F.3d at 619 (governor proclaims that Good Friday "is a day charged with special meaning to multitudes throughout the Christian world"), 621 ("The state has accorded special recognition to Christianity."), 622 ("On its face, and even without regard to the governor's proclamation, the challenged statute, given the unambiguously sectarian character of Good Friday, promotes one religion over others."). When a statute contains such a facial sectarian preference, the gov-

ernment may bear the duty of producing evidence of a secular purpose. See *Wallace* v. *Jaffree*, 472 U.S. 38, 57-58 (1985) (where statutory text, legislative record, and testimony of sponsor made the "wholly religious character" of the bill "plainly evident," Court noted failure of State to "present evidence of any secular purpose"); cf. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993) (where law burdening free exercise is not neutral or of general application, burden is on government to demonstrate that its interests are compelling); *Amos*, 483 U.S. at 339 (laws discriminating among religions are subject to stricter scrutiny than those benefiting all religions uniformly).

FUTA, however, contains no sectarian preference "on its face," or in "its legislative history" or "its interpretation by a responsible administrative agency." *Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987). Nor, given the statute's authorization of numerous secular exemptions, can FUTA be said to have a "wholly religious character." *Wallace*, 472 U.S. at 58. Accordingly, the court of appeals correctly adhered to this Court's ordinary rule that the challenger in an Establishment Clause case "must be able to show the absence of a neutral, secular basis" for the statute. *Gillette* v. *United States*, 401 U.S. 437, 452 (1971); *Walz*, 397 U.S. at 676 (burden on person attacking tax exemption); see also *Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983) (noting courts' ordinary "reluctance to attribute unconstitutional motives to the States, particularly when a plausible

secular purpose for the State's program may be discerned from the face of the statute").[12]

Second, *Metzl* involved the unusual situation where the State chose to hinge its defense on empirical facts about the operation of the school system that were, for the most part, provable only by the State. 57 F.3d at 622. Other courts have subsequently commented upon the uniquely fact-specific and narrow scope of the *Metzl* decision. See *Koenick* v. *Felton*, 973 F. Supp. 522, 529 (D. Md. 1997); *Granzeier* v. *Middleton*, 955 F. Supp. 741, 749-750 (E.D. Ky. 1997). The present case, by contrast, involves the traditional consideration of legislative facts concerning the operation of a statutory program and its administrability in the religious arena. *Metzl* acknowledged that such "legislative facts" are not ordinarily "subject to rules of evidence developed largely for the control of lay juries," but rather "can be settled as a matter of first or general principles." 57 F.3d at 622.

In short, *Metzl* is legally and factually distinct from—not in conflict with—the decision of the court of appeals in the present case.[13]

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[12] In any event, petitioner makes no effort to demonstrate that a different allocation of the burden of production would have changed the outcome of the case.

[13] In addition, the district court addressed, but the court of appeals left unresolved, jurisdictional objections to petitioner's suit based on Article III standing limitations, the Tax Injunction Act, 28 U.S.C. 1341, and the doctrine of abstention. Pet. App. 6-7, 20-28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1997

GUADALUPE ROJAS,

Petitioner,

v.

LAWRENCE FITCH, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

SUPPLEMENTAL BRIEF OF PETITIONER ROJAS

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QUESTIONS PRESENTED

1. Does *Agostini v. Felton*, ___ U.S. ___, 117 S.Ct. 1997 (1997), and other Establishment Clause precedent support the unemployment tax exemption which now expressly divides the universe of all non-profit, charitable, and educational employers into two categories, the religious and the secular, granting the exemption to the religious and denying it to the secular?

2. Where a statutory benefit on its face targets religion as the beneficiary, excluding similar but secular entities, does the government bear the burden of producing evidence of a secular purpose?

3. Does a statutory tax exemption granted to an employer, based on the employer's religious status, which operates to deny an employee eligibility for a Social Security Act benefit, contravene the Establishment Clause and prior decisions of this Court?

THE PARTIES

Guadalupe Rojas, Plaintiff and Petitioner

Lee H. Arnold, Director, R.I. Department of Employment and Training, Defendant, substituted for original defendant Lawrence Fitch, former Director.

Secretary, United States Department of Labor, Defendant

The Salvation Army, Defendant

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported as *Rojas v. Fitch*, 127 F.3d 194 (1st Cir. 1997), and that decision affirmed the judgment of the District Court for the District of Rhode Island, *Rojas v. Fitch*, 928 F.Supp. 155 (D.R.I. 1996). By order dated December 18, 1997, the First Circuit denied the petition for rehearing and suggestion for rehearing en banc.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

Guadalupe Rojas submits this Supplement to her Petition, in accordance with Rule 15.8 of the Rules of the Supreme Court, in order to call attention to a Decision issued subsequent to her Petition. That decision, now published, is *Appeal of Springmoor*, 498 S.E.2d 177 (N.C. 1998), and it was issued on April 3, 1998.

In *Springmoor*, the North Carolina Supreme Court, with three Justices dissenting, found a state tax exemption statute to be violative of the Establishment Clause of the First Amendment, as well as a similar provision in the North Carolina Constitution. The statute at issue related to the tax status of homes for the aged, sick, or infirm. If such an entity was owned, operated, and managed by a religious or Masonic organization, then it was exempt from the applicable tax. If not, it was taxable. *Springmoor*, 498 S.E.2d at 179.

The majority opinion of the North Carolina Court reads the Establishment Clause caselaw in a manner very much at odds with the analysis of the Court of Appeals in

the present case. The *Springmoor* court correctly analyzed *Walz v. Tax Commissioner,* 397 U.S. 664, 90 S. Ct. 1409 (1970), as founded on the fact that New York was exempting not just churches but also similar secular entities which the state determined had a "beneficial and stabilizing influence in community life". *Springmoor* at 181.

Of particular relevance is the analysis of the entire exemption statute in North Carolina, which did include "a broad range of classifications." But that breadth did not insulate the exemption. The Court noted at 182:

> It is entirely appropriate to consider, in the context of determining whether this classification is proper, only the legislative treatment of all similarly situated non-profit homes for the aged, sick, or infirm.

The *Springmoor* decision then goes on to find that the statute had a principal or primary effect of advancing religion because it exempted religious institutions "while denying a similar benefit to identically situated secular homes". *Id.,* at 183.

The debate between the dissenters and the majority in *Springmoor* tracks the confusion inherent in the First Circuit's analysis in the present case. The dissent in *Springmoor* urged that since upwards of thirty or forty different types of property are exempt under the state's laundry list, there must be some general overriding secular purpose in the legislation, the same argument which has been stressed repeatedly to clothe the unemployment tax exemption with borrowed protection.

The *Springmoor* majority correctly asks whether the exemption for homes for the aged has a valid secular purpose, which it obviously could, and then finds the defect in the fact that:

> Religiously affiliated homes are singled out for a tax benefit denied to others that are similarly capable of carrying out the secular objective which the State may wish to encourage. *Id.* at 183.

In the present case, it was stipulated that if Rojas had worked for a similar non-profit social service employer, analogous to The Salvation Army in every way save one – the statutory pre-requisite of religion, she would have been protected by the unemployment benefit system because that employer would not have been exempt.

CONCLUSION

The issue of how the government, federal or state, may bestow a financial benefit on a category of institutions in our society, including religious institutions, is an issue of great importance. Contrasting the analysis and results in *Springmoor* with that of the First Circuit, and contrasting the competing Establishment Clause approaches of the majority and dissenting opinions in *Springmoor,* one comes to the conclusion that this Court should grant *certiorari* and clarify that the Court of

Appeals below has strayed from the neutrality principle of the Establishment Clause.

Respectfully submitted:

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